Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1995

UNITED STATES OF AMERICA
EX. REL. DILIP K. PAUL,
Petitioners,

v.

U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION and PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC., PB-KBB, INC. and BATTELLE MEMORIAL INSTITUTE,
Respondents.

Petition For A Writ Of Certiorari
The United States Court Of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can the state courts have concurrent jurisdiction, along with the U.S. courts, over a case arising from the False Claims act, when the *Article 1, Sections 8 and 9 provides exclusive rights to the Congressional Actions and Section 10 of the U.S. Constitution* made such powers exclusive by virtue of express provisions prohibiting any state action?

    a. Whether Harris County District Court, Texas, has concurrent jurisdiction along with U.S. District Courts for claims arising under 31 U.S.C. §3730(b) and (h), when the *qui tam* plaintiff, in its opening pleading, sets up a right under the said law as a ground for recovery for the U.S. and for himself?

2. Whether Harris County District Court has in personam jurisdiction over undocumented Canadian domicileds, and over people domiciled in Germany, to pass judgment on a case rising under the False Claims Act?

3. Whether Harris County District Court has the authority to try a case arising under the False Claims Act, where intentional torts and frauds have been perpetrated against the United States, in Utah, Texas, Louisiana and in Mississippi, by people who are undocumented foreign citizens?

4. Whether the Texas state laws and procedures can be used to adjudicate the claims arising under the False Claims Act by disregarding the mandates and procedures of the said Act?

5. Whether, due to a judgment obtained by frauds in Harris County District Court over a complaint on safety violations in a design in Texas, can be used to preclude False Claims Act violations and related claims arising in four states?

6. Whether a complaint over a safety violation in design filed over a period of six weeks can preclude False Claims Act related claims arising over 7-8 years, for swindling the United States (almost all of these arose afterwards under the doctrine of res judicata and collateral estoppel)?

7. Whether a claim in safety violation in a design can collaterally estop claims of defrauding the United States, which were never adjudicated?

8. Whether the litigation involving one party in a state court can be used to preclude claims against different parties in a subsequent action in the U.S. courts, under the doctrine of collateral estoppel?

9. Can a U.S. Magistrate rule on matters materially affecting the plaintiffs' interests without the parties' consents, disregarding the requires of U.S.C. §636 *et seq.*?

10. Can the U.S. District Court enter summary judgment in a case without permitting discovery under Federal Rules of Civil Procedure §12(b)(6), and under §56?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no parent or subsidiary companies which are required to be listed.

Petitioners: United States of America
ex. rel. Dilip K. Paul

Respondents: U. S. District Court for the Southern District of Texas, Houston Division and Parsons, Brinkerhoff, Quade & Douglas, Inc., PB-KBB, Inc. and Battelle Memorial Institute

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as 53 F.3d 1282 (5th Cir. 1995) and is re-printed in the Appendix, pages App.1 through App.6.

That opinion affirmed the decision of the United States District Court for the Southern District of Texas, Houston of August 1, 1994, dismissing Paul's qui tam complaint citing res judicata and collateral estoppel, which reported as *United States ex rel. Paul v. Parson, Brinkerhoff, Quade & Douglas, Inc.*, 860 F. Supp. 370 (S.D. Tex 1994) and which is re-printed in the Appendix, pages App.7 through App.17.

JURISDICTION OF THIS COURT

The U.S. District Court in Houston had exclusive jurisdiction to try this case under 31 U.S. C. §3732(a). Petitioner is the sole and original source of information of the frauds against the United States, and is entitled to bring this action under 31 U.S.C. §3730(b) and (h). The U.S. District Court also had the exclusive jurisdiction to try this case under 28 U.S.C. §§1331, 1332(a)(2), 1345, 1355, 1357 and 1407. The United States Court of Appeals for the Fifth Circuit had jurisdiction over the matter pursuant to 28 U.S.C. §1291. The judgment of that Court (Appendix pp. 1-6) was entered on April 28, 1995. A motion to submit a late petition for rehearing was granted on June 9, 1995, but the petition for rehearing was denied on July 10, 1995 (App, pp. 1-6). The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Constitution, Article I, Sections 8, 9 and 10; Article II, Section 2; Article III, Section I; Section II, and Article VI.

United States False Claims Amendments Act of 1986, 31 U.S.C. §3726 *et seq.*

STATEMENT OF THE CASE

Statement of the Facts

Battelle Memorial Institute invited a bid on behalf of the U.S. Department of Energy (DOE), Office of the Nuclear Waste Isolation (ONWI), in 1981, for designing 1/2 mile deep underground exploratory shaft facilities in Utah, Texas, Louisiana and in Mississippi. Parsons, Brinkerhoff, Quade & Douglas, Inc. (hereafter PBQD), and PB-KBB, Inc., forming a joint venture known as PBQD/PB-KBB, and along with subcontractors with people from six countries, spanning three continents, received a contract in June, 1982, after submitting a fraudulent bid. The contract required that the designs of the facilities be completed by the end of 1983, construction to be started at that time and be completed by 1985. However, defendants submitted false claims to the U.S. until 1988, and collected money, without ever completing a single contracted-for task.

None of the defendants have know-how as to how to perform the contracted for tasks. Defendants submitted fraudulent performances to the U.S.

Petitioner was an employee of PB-KBB, in their main office In Houston from mid-April, 1981. Upon joining the ONWI project office in mid-June, 1982, he determined that

the Battelle provided design concept would not comply with the written terms of the executed federal contract. He also determined that essential data, i.e., noxious, explosive, reactive and toxic gas occurrence data, in the subsurface geologic strata where the facilities were proposed to be constructed, essential for properly starting the contracted-for design process and calculations, were lacking. Dilip Paul wrote PBQD/PB-KBB's management that the design process could not be started without those vital data.

In retaliation and in conspiracy with their subcontractor German-owned Thyssen's Canadian domiciled employees, PBQD/PB-KBB fired Dilip Paul from the ONWI project office. PBQD/PB-KBB then assigned Dilip Paul's work to the Canadians, S. Poppen and J. Konopka. Together they did the fraudulent design, disregarding the requirements and use of geologic data. More importantly, Battelle, PBQD/PB-KBB, and their subcontractors repeatedly misrepresented the fraudulent work to the U.S.

After Dilip Paul was fired from the ONWI project office, he was sent back to the PB-KBB's main office where he wrote the memo on August 6; he was fired on August 18, 1982, by PB-KBB's Vice President Jack Schemedeman for writing the memo, and for making a record about PBQD/PB-KBB's fraudulent designs.

After he was fired, Dilip Paul filed a complaint with the EEOC and with MSHA in September, 1982. PB-KBB, in the meantime, initiated negotiations to hire him back. But after learning about his complaint to MSHA, which was sent by that agency to DOE and Battelle, PB-KBB refused to hire him back. Dilip Paul then filed a complaint with MSHA again for PB-KBB's second discriminatory retaliation.

When EEOC contacted PB-KBB on Dilip Paul's firing, PB-KBB, in their defense, submitted a forged letter in their defense. Dilip Paul ultimately withdrew his EEOC related

discrimination complaint from the U.S. District Court after filing there. Dilip Paul then filed with the Mine Safety Review Commission, which case was dismissed for lack of jurisdiction.

Mr. Paul then filed with the Texas State Court where PB-KBB perpetrated frauds on the court by stating that lack of work was an additional reason for Dilip Paul's firing and obtained a judgment in their favor. That judgment was also not on the merits as that court lacked jurisdiction over an essential party under Federal Rules of Civil Procedure 19, the Canadian, who conspired to have Dilip Paul fired and who profited as a result of his firing. PB-KBB refused to answer questions on who replaced Dilip Paul in the ONWI project office, and it kept hidden the facts about the Canadians replacing Dilip Paul in their Houston Office, while it was defending itself to the Mine Safety Review Commission.

PB-KBB's fraudulent "lack of work" defense contradicted its prior testimony to the Mine Safety Review Commission, where it stated that they had vacancies but they were looking for someone other than Dilip Paul due to his complaints to them and to MSHA, and due to his refusal to participate in their criminal enterprises.

After learning of Dilip Paul's complaint from MSHA, Battelle and PBQD/PB-KBB entered into a series of fraudulent contract amendments, design amendments and submitted to the U.S. a continuous stream of fraudulent designs until 1988, which ultimately led to the collapse of the project, where the government spent upward of $25 billion.

Petitioner filed the instant case under 31 U.S.C. §3730(b) and (h) on behalf of the United States and on his own behalf, on July 27, 1992 against PBQD/PB-KBB.

Petitioner then filed a similar complaint against

Battelle Memorial Institute. The two complaints were consolidated upon a motion of the U.S. Department of Justice and by the court order.

The issues in the instant case are different than those litigated in the Harris County District Court. There are more than 14 issues which were never litigated before. The issues arose under different circumstances, under different contracts and contexts, time-wise, space-wise, jurisdiction-wise. The claims also arose under different circumstances. These claims and issues could not have been brought at the time of Texas state court litigations as the contracts were still in progress.

The U.S. District Court, after denying Dilip Paul's discovery requests, entered summary judgment dismissing petitioner's complaints and citing *res judicata* and *collateral estoppel* due to his prior litigation against PB-KBB in the Harris County District Court. The court held that Texas State Court had concurrent jurisdiction, along with the U.S. courts, to try cases arising under the False Claims Act. Further, the court stated in its ruling that it is using the Texas state laws in deciding issues and claims arising from said Act. It determined that PBQD had a derivative relationship with PB-KBB, even though defendants' own pleadings submitted to the EEOC denied such relationship. The judge cited a Texas state law and collaterally estopped the petitioner to press its claims against PBQD. He *sua sponte* dismissed plaintiff's claims against Battelle, citing a Texas state case law. The court ignored the Canadians in determining the jurisdiction of the instant case, even though this issue was brought by the petitioner. The court disregarded the issue of PB-KBB's repeated perpetration of frauds in the courts even though the petitioner brought the issue in its pleadings. The court precluded petitioner from pressing his claims against defendants, even though those issues and claims

arose under different contracts, and arose years after his filing of the original case. Petitioner brought the issue of subsequent and collusive contracts in his pleadings in the District Court. The court ignored each and every issue and argument the petitioner brought in the instant case.

Petitioner then filed a timely appeal in the Fifth Circuit Court of Appeals, where the court summarily affirmed the Texas State Court judgment, stating that Harris County District Court has concurrent jurisdiction with the U.S. District Courts in deciding claims arising under the U.S. False Claims Act.

The Circuit Court did not review petitioner's other contentions that the state judgment was not the final judgment on the merits, but instead was void, because the state court lacked subject matter and in personam jurisdiction over indispensable parties; and that PB-KBB fraudulent obtained the judgment, stating that those issues were not raised in the District Court.

Dilip Paul then petitioned the Circuit Court that those issues have been brought in the District Courts, citing on the the records. The court below denied to review its decision on July 10, 1995.

This petition for certiorari to this Court is brought within 90 days, starting from July 10, 1995. Hence, this petition is filed timely.

REASON FOR GRANTING WRIT

Summary of Arguments

The case involved the summary decisions of the courts below, where petitioner believes the requirements of Article I, Sections 8, 9 and 10, and Article II, Section 3 of the U.S. Constitution are not complied with.

As per the legislative history, the False Claims Amendments Act of 1986 was enacted in order "to enhance Government's ability to recover losses sustained as a result of fraud against the Government." The Congress intended to enact the amendment in order to have uniform interpretation throughout the country, to protect whistle blowers from retaliation and to encourage private individuals to come out with information of wrongdoing and aid in furtherance of the intent of the Act.

This case is important because if it is allowed to stand as is, the whole statutory scheme behind the False Claims Act will be totally and irrevocably damaged. The judgments and rulings of the courts below are inconsistent with this Court's longstanding interpretations and holdings on Article I, Sections 8, 9, 10, and on Article III, Section 2 of the United States Constitution, as outlined in the cited case laws. The courts below have not only disregarded the Constitutional requirements in their summary judgments, but also disregarded a number of holdings of this court in a number of landmark cases. If the rulings of the courts below are allowed to stand, the violation of the Constitutional provisions will remain unaddressed and a number of case laws of this court will be automatically overturned.

For these reasons, this Court should grant certiorari to this case.

A Number of Important Questions of First Impression Before This Court

Arguments on Question No. 1

The courts below held that state courts have concurrent jurisdiction over the instant case. petitioner contends that this holding is erroneous under the following constitutional grounds. Article I, Section 8 of the U.S. Constitution provides,

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

As per the statutory history of the Nuclear Waste Management, the congress had to pass repeated legislations against vehement oppositions of every state of the Union, by asserting its Constitutional authorities in order to emplace the wastes. Further, the nuclear wastes come form defense as well as from civilian projects.

The U.S. contract in question and the obligations thereof arose under this provision of the Constitution. By explicit and implicit provision, the contractual terms shall have to be enforced uniformly throughout the United States. Under this provision, the U.S. courts have exclusive jurisdiction to uniformly adjudicate the contractual obligations arising therefrom. The state courts shall be excluded from adjudicating such contracts.

Further, Article I, Section 9 of the U.S. Constitution provides,

> "No money shall be drawn from the Treasury but in consequence of appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public money shall be published from time to time."

The money defrauded by the defendants were appropriated under this provision of the Constitution, and hence the U.S. courts will have exclusive jurisdiction to try the case as per the U.S. False Claims Act.

Again, Article I, Section 10 of the U.S. Constitution provides,

> "No State shall enter into any treaty, alliance or confederation; grant letters of Marque and Reprisal; coin money; Remit Bills of Credit; make any thing but gold and silver coin in tender in payments of debts; pass any Bill of Attainder, ex post facto law, or law impairing the obligation of contracts, or grant any Title of Nobility.
>
> "No State shall, without the consent of Congress, lay any duty of tonnage, **keep troops, or ships of war in time of peace,** enter into any agreement or compact with another State, or with a foreign power, **or engage in war,....**"
> [Emphasis added]

This is explicitly clear that the states are prohibited from getting involved in defense related activities and in passing any law which will interfere with U.S. contracts. As such, the state courts shall be excluded from adjudicating the instant case involving, nuclear wastes and obligations of U.S. contracts thereof, under this provision of the Constitution.

Further, the instant action arose under the U.S. False Claims Act and under U.S. Nuclear Waste Disposals-related Acts, and as such, under Article III, Sections 1 and 2 of the Constitution, the U.S. courts will have exclusive jurisdiction to try this case. Moreover, under the Supremacy Clause of Article VI, Section 2 of the Constitution, whatever extent Congress has exercised its powers, any "inconsistent" state laws are prohibited.

Hence, the courts below erred in holding that the state courts have concurrent jurisdiction, along with the U.S. courts, to adjudicate the instant case.

Arguments on Question No. 1(a)

Petitioner agin contends that the courts below erred in their rulings over the instant case, based upon every one of this court's determinations on this issue.

In *Martin v. Hunter's Lease*, 14 U.S. (1 Wheat.) 334, 335, 4 L.Ed 97, 104, 105 (1816), this court stated,

> "In what cases (if any) is this judicial power exclusive, or exclusive at the election of Congress? It will be observed that there are two classes of cases enumerated in the Constitution, between which a distinction seems to be drawn. The first class includes cases arising under the Constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers and consuls, and cases of admiralty and maritime jurisdiction. In this class the expression is, 'and that the judicial power shall extend to all cases'; but in the subsequent part of the clause which embraces all other cases of national cognizance, and forms the second class, the word "all" is dropped seemingly ex industria. Here the judicial authority is to extend to controversies (not to all controversies) to which the United States shall be a party, etc. From this difference of phraseology, perhaps, a difference of constitutional intention may, with propriety, be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some

determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention. In respect to the first class, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power either in an original or appellate form to all cases;....

"The vital importance of all the cases enumerated in the first class to the national sovereignty, might warrant such a distinction. In the first place, as to cases arriving under the Constitution, laws, and treaties of the United States. Here the state courts could not ordinarily possess a direct jurisdiction. The jurisdictions over such cases could not exist in the state courts previous to the adoption of the Constitution, and it could not afterwards be directly conferred on them; for the Constitution expressly requires the judicial power to be vested in courts ordained and established by the United States. This class of cases would embrace civil as well as criminal jurisdiction, and affect not only our internal policy, but our foreign relations. It would, therefore, be perilous to restrain it in any manner whatsoever, inasmuch as it might hazard the national safety.

"All these cases, then, enter into the national policy, affects the national rights, and may affect the national sovereignty. The original or appellate jurisdiction ought not, therefore, to be restrained, but should be commensurate with the mischiefs intended to be remedied, and, of course, should extend to all cases whatsoever."

The instant case belongs to Class I, as outlined in this case law. Hence the state courts will not have jurisdiction to try this case. The holdings of this case law is upheld by the following case law and by every other case

In *The Moses Taylor v. Hamons*, S.C. 4 Wall, 411-431 at 428-429 (1866), this Court agreed with the conclusions reached in *Martin v. Hunter's Lease, supra*, by stating,

> "The Constitution declares that the judicial power of the United States 'shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies to the United States shall be a party; to controversies between two or more states, between a state and citizens of another state; between citizens of different states, between citizens of a state claiming lands under grants of different states; and between a state or citizens thereof and foreign states, citizens or subjects.' Art. III. 2.
>
> "The vital importance of all the cases enumerated in the first class to the national sovereignty is mentioned as a reason which may have warranted the distinction, and which would seem to require that they should be vested exclusively in the national courts--a consideration which does not apply, at least with equal force, to cases of the second class.

> Without, however, placing implicit reliance upon the distinction stated, the learned justice observes, in conclusion, that it is manifest that the judicial power of the United States is, in some cases, unavoidably exclusive of all state authority, and that in all others it may be made so at the the election of Congress. We agree fully with this conclusion. The legislation of Congress has proceeded upon this supposition. The judiciary act of 1789, in its distribution of jurisdiction to the several federal courts, recognizes and is framed upon the theory that in all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts."

Again as per this Court's citation of *Pratt v. Paris Gaslight & Coke Co.*, 168 U.S. 255 at 259, 18 S.Ct. 62 at 64, 42 L.Ed 458, in *Pan American Petroleum Corp. v. New Gas Title County et al.*, 366 U.S. 656 at 664-665 (1961), the state courts will not have subject matter jurisdiction to try the instant case.

> "There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading--be it a bill, complaint, or declaration --sets up a right under the patent laws as ground for recovery. Of such the state courts have no jurisdiction."

The instant case clearly belongs to Class 1 type, as characterized by this Court.

From the numerous cases decided by this Court, there is no concurrent jurisdiction of the state courts with the U.S.

courts in deciding the instant case. So *res judicata* by adopting Restatement (Second), and collateral estoppel, entered by the District Court in Houston, and affirmed by the Fifth Circuit Court of Appeal, is clearly in error.

In *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22 (1912), this Court stated,

> "Of course, the party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a 'suit arising under'-----. That question cannot depend upon the answer, and accordingly jurisdiction cannot be conferred by the defense, even when anticipated and replied to in the bill. *Devine v. Los Angeles,* 202 U.S. 313, 334, 50 L.Ed 1046, 1053, 26 S.Ct.Rep.652. Conversely, when the plaintiff bases his cause of action upon an act of Congress, jurisdiction cannot be defeated by a plea denying the merits of the claim."

In *Slocum v. Mayberry et al.*, 2 Wheat 8, this court stated, "If the officer has right, under the laws of the United States,...the question...belongs exclusively to the federal courts, and cannot be drawn in another forum,..." Again in the same case, this court stated, "The detention would have been by virtue of an act of Congress, and jurisdiction of a state court could not have been sustained."

For the aforesaid reasons, the judgments entered in the instant case by the courts below, do not comply with **Article III, Section 2 of the United States Constitution,** as interpreted by this Court in the cited case laws, and are therefore void.

Further, in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479, 101 S.Ct. 2870, 2875 (1981), this court stated,

> "Congress, however may confine jurisdiction to federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."

Petitioner contends that Congress has explicitly (31 U.S.C. 3732(a) and (b)) given jurisdiction exclusively to the Federal Courts.

[Legislative History, P.L. 99-562, Senate Report No. 99-345, page 4, The False Claims Act was

> "Enacted in 1863 in response to cases of contractor fraud perpetrated on the Union Army during the Civil War, this statute has been used more than any other defending the Federal Treasury against unscrupulous contractors and grantees."]

Article II, Section 2 of the Constitution, explicitly makes the President as Commander-in-Chief, and hence the act enacted to protect that Army shall be adjudicated exclusively by the Federal Courts and states are prohibited to interfere with such Acts.

The Congress specifically stated on page 7,

> "Unlike most other types of crimes of abuses, fraud against the Federal Government can be policed by only one body--the Federal Government. **State and local law enforcement are normally without jurisdiction where Federal funds are involved.**"

On Page 16 of the same Senate Report, it was stated,

> "And finally, in response to comments from the National Association of Attorneys General, the subcommittee adapted a provision allowing State and local governments to join state law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occurrence."

This statement clearly indicates that Congress did not want State courts to have concurrent jurisdiction over this Act.

The Congress confined the jurisdiction of False Claims Act adjudications to the Federal Courts implicitly as well. See Legislative History, P.L. 99-562, page 23, 31 U.S.C. §3729, subsection (e), wherein it is stated,

> "Under Federal Rule 64, Federal Rules of Civil Procedure, the Government's pre-judgment attachment remedies are governed by State law in the district in which district court is held. A uniform Federal standard for the employment of these remedies in cases brought under the False Claims Act would significantly enhance the Government's litigating ability in this area, by avoiding the whims and vagaries of widely varying state procedure for attachment. The bill contains effective remedies to prevent a potential defendant's dissipation of assets pending litigation. These remedies flow from the district court's inherent power to grant injunctions."

The Congress also gave jurisdiction to try such cases to the U.S. Claims Courts (Legislative History, P.L. 99-562, Senate Report No. 99-345, page 33, §3732, subsection (b)). There was absolutely no consideration given to grant jurisdiction to the state courts.

Obviously, when Congress did not give jurisdiction to the state courts, the courts below could not give jurisdiction arbitrarily.

Further, there is a clear and definite incompatibility of False Claims Act's intent and states' interest in the adjudication of the Act. In fact, many state agencies have become defendants in cases arising out of the False Claims Act. The False Claims Act deals with U.S. funds, and all of the states are in the receiving ends of the U.S. funds. When states are competing with each other for U.S. funds, obviously Congress could not have empowered them to adjudicate False Claims Act related cases. The states have conflict-of-interest when adjudicating federal funds. Hence, as such, there is a clear incompatibility for state courts' adjudication of such cases. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 4 L.Ed 579 (1819).

Arguments on Question No. 2

Plaintiff brought the issue of an undocumented Canadian domiciled employee, J. Konopka, replacing Dilip Paul in the ONWI project office, in the U.S. District Court in Texas. Plaintiff also pleaded diversity jurisdiction in the said court. Again, plaintiff pleaded in the same court that decisions regarding the bidding and performance of the U.S. contracts were made by people living in Germany. These issues are on records, and can be verified **(records, response by qui tam plaintiff to PBQD's response, dated 11/8/95, deals with diversity jurisdiction, pp. 1-52; for bringing the issues of Canadian domiciled, see p. 38 of the same response. Further, see record, response by qui tam**

plaintiff to Battelle's response dated 12/9/93, summary page which deals with diversity jurisdiction, subject matter jurisdiction, and territorial jurisdictions. Also see record, qui tam plaintiff's response of 1/18/94 to defendant's motion, p. 16, argued about jurisdictional issues, specifically about state court's personal jurisdiction over people of Germany making decisions on the contract).

These pleadings fully satisfy the requirements of Federal Rules of Civil Procedure (FRCP Nos. 7, 8, 9, 10 and 11). Petitioner also submitted the contracts and other exhibits in the U.S. District Court, which fully satisfy the requirements of pleadings, under FRCP 10(c). Also see *Arfons v. E. I. DuPont De Neumours & Co.*, C.A. 2d, 261 F.2d 434 (1958); *Sisk v. Texas Wildlife Dept.*, C.A. 5th, 644 F.2d 1056, 1059 (1981); *Robins v. Rarback*, C.A. 2d, 325 F.2d 929, certiorari denied, 85 S.Ct. 670, 379 U.S. 974, 13 L.Ed 2d 565 (1963). In *U.S. v. Provident National Bank*, 259 F.Supp. 373, certiorari denied, 87 S.Ct. 778, 385 U.S. 1034, 17 L.Ed 2d 682 (D.C. Pa. 1966), it was held, "Pleadings are not to be held to the rigid standards of common law, and neither absolute clarity nor absolute precision is required."

Defendants did not deny any of the allegations made on these issues in the U.S. District Court. Due to their non-denials, they also admitted these jurisdictional allegations in the district court.

These issues were brought to underscore diversity jurisdictions and Texas state court's lack of in personam jurisdictions over these foreign citizens, who are indispensable parties, under FRCP 19, to try the instant case.

The U.S. District Court did not mention about the diversity and in personam jurisdiction issues while entering summary judgment in the case. These were brought by the plaintiff in his appeal in the Fifth Circuit Court. However, in its summary decision, the appeal court stated that it could not review those issues, as those were not brought in the

district court. Plaintiff then petitioned the Fifth Circuit Court for rehearing the case, stating that he brought these issues in the district court, and cited on records, mentioning where those issues can be found. However, the appeal court denied rehearing of the case.

As mentioned in the statement of the case above, that PBQD/PB-KBB employed as many as six subcontractors, with people from six different countries, spanning from three continents, while they were defrauding the United States, in violation of the False Claims Act.

However, the U.S. District Court as well as the Court of Appeals erred while entering their summary judgments, by holding that plaintiff could have litigated the instant case in the Harris County District Court, by totally disregarding the issues of in personam jurisdiction and diversity of defendants. These major issues could have totally changed the outcome of the case. But the treatments given in the summary proceedings in the court below, without following the Federal Rules of Civil Procedures and appellate procedures, have led to these erroneous decisions in the case.

Arguments on Question No. 3

As per *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 NE 2d 761 (1961), and as per *Murphy v. Erwin-Wasey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972), the jurisdiction to try the case of the intentional torts liabilities will be in those counties where the victims would be affected. Hence, the intentional torts of criminal mine design would not affect the people of Harris County, but would affect the people of the seven counties spread over four states where the federal facility sites are located. So the jurisdiction to try the instant case would be in those seven counties and not in Harris County. *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 24 L.Ed 565 (1877). This would be the case if the tort feasors were all U.S. domiciled.

But when the tort feasors were foreign citizens, domiciled in Canada and in other countries, the state courts would lack the in personam jurisdiction over the parties to try the case and the instant case can only be tried in a U.S. court.

Further, the solicitation, bidding and the execution of the Battelle-PBQD/PB-KBB contracts at issue were done from Columbus, Ohio. Under *Burger King v. Rudzewicz*, 471 U.S. 462, 105 S.Ct. 2174, 85 L.Ed 2d 578, the jurisdiction to try the instant case will be in Ohio. Again, Harris County District Court could not try the instant case.

Arguments on Question No. 4

This court has repeatedly held the position that the rights and duties of the United States, when dealing with such cases such as the one arising under the False Claims act, are governed by federal rather than by local law. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed 838 (1943); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed 2d 711 (1979).

Petitioner contends that both the U.S. District Court in Houston and the Fifth Circuit Court of Appeals erred in their summary rulings that Texas state laws would govern in deciding the instant case.

The Congress specifically stipulated how the False Claims Act would be adjudicated, which tribunal(s) to decide the claims arising out of the Act, and have repeatedly emphasized the need for uniform interpretation of the Act. This court has taken the position in *Galveston, H & S.A.R. Co. v. Wallace*, 223 U.S. 841, 488 (1911) that cases such as the instant one must be adjudicated following the statutory directives, and local laws and rules cannot be applied in deciding the instant case. Hence, the courts below erred in their rulings.

Arguments on Question No. 5

Petitioner brought the issue of PB-KBB's obtaining the judgment by frauds in the Texas state court, in his appeal to the Fifth Circuit. The Fifth Circuit Court declined to review the issue stating that the issue was not brought in the U.S. District Court. Petitioner brought that issue of frauds in the District Court. **(See record, response by qui tam plaintiff to PB-KBB's response dated 11/8/93, pp. 1-56, dealing with frauds on the court and with jurisdiction.)** For those reasons, the Fifth Circuit Court of Appeals erred in declining to review the issues.

Judgment obtained by frauds have no judicial value, and that judgment cannot have any preclusive effect. PB-KBB, after firing Dilip Paul, turned over his job functions to the Canadians and came back to the Texas state jury and stated that lack of job was an additional factor, besides his complaint on unsafe mine design, in terminating Paul. This assertion in the court was fraudulent, perjurious and was in contradiction to its prior admissions to the Mine Safety Review Commission's proceedings. In there, PB-KBB stated that they had vacancies, they hired people and they were looking for someone other than Dilip Paul. So lack of job was the fraudulent defense, by which they won the judgment in the Texas court. In the Texas court, the judgment was brought by perjurious changing of their prior defense, which is in the records.

Further, the Canadians conspired to have Dilip Paul fired and took over his job functions. PB-KBB was hiding facts about the Canadian conspiracy in the Mine Safety Review Commission proceedings and in the Texas state court, and they could not be brought in the trial. The Canadians are an indispensable party under FRCP 19, and the Texas court judgment, entered without them, is void. *Hanson v. Danckla*, 357 U.S. 235, 78 S.Ct. 1228, 220 L.Ed 2d 70, 1283.

The Canadians are an indispensable party in the instant case as well. The Texas state court has no jurisdiction over them and the instant case could not be brought in the Harris County District Court. Hence, *res judicata* and *collateral estoppel*, using Restatement (Second), cannot be used in the instant case.

Arguments on Question No. 6

The claims in the instant case were never litigated and could not be done in the Texas state court. Most of the false claims submitted to the U.S. and money collected, over a period from 1982 through 1988, were done after Dilip Paul was fired and after he submitted his complaint to the MSHA. Most of the issues arose after Dilip Paul was fired by PB-KBB, and were never litigated and could not be litigated in the Texas state court. Dilip Paul was in the ONWI project for six weeks, mid-June, 1982, through the end of July, 1982. However, the false claims arose from mid-1981, when a fraudulent bid was submitted, and ended in 1988, over a period of seven years when Congress cut down further funding of the project.

The contracts and the designs have been changed a number of times as a result of Dilip Paul's litigations, and most of the false claims were submitted under the new or changed contracts, and the U.S. was defrauded under the new contracts. The claims under the new contracts arose under new scope of work, after the filing of Dilip Paul's complaint and they could not be brought at the time of original lawsuit.

Hence, as per this court's holding in *Commissioner of Internal Revenue v. Sunnen*, 33 U.S. 591, 592, 68 S.Ct. 705, 92 L.Ed 898 (1948), petitioner's claims arose after his filing of the initial claims, under different contracts, under a different scope of work, could not be collaterally precluded from subsequent litigations.

Further, those issues raised in the instant case were not actually litigated and could not be litigated in the Texas state court. Hence, as per *Cromwell v. County of Sac.*, 94 U.S. (4 Otto) 351, 24 L.Ed 195 (1876) (Restatement [Second] of Judgment, 27), petitioner cannot be collaterally estopped from subsequent litigations over those issues.

Therefore, the judgments entered in the courts below are erroneous, contrary to many of this court's holdings.

Arguments on Question No. 7

The United States is the real party of interest in the instant case. It was not a party in the original *Paul v. PB-KBB* litigation in the Texas state court. As per *U.S. v. Mendoza*, 464 U.S. 154 (1984), the instant case cannot be collaterally estopped.

Arguments on Question No. 8

The original lawsuit was between *Paul v. PB-KBB*. There is no corporate relations or privity between PBQD and PB-KBB, as per PBQD and its parent company, Parsons & Brinkerhoff, Inc.'s own submissions to the EEOC. There is no derivative relationship between the parties. Moreover, PBQD is in conspiratorial relationships with the Canadians in defrauding the United States, over whom the Texas state court lacked jurisdiction. For that reason, PBQD and their conspiratorial Canadian partners could not be tried by the Texas state courts.

As PBQD remained liable to the United States and to the petitioner, so does Battelle because of its complicity and collusion in defrauding the United States, and due to its vicarious liability. All of the parties are liable to Dilip Paul for discrimination under 31 U.S.C. §3730(h).

Wherefore, the courts below erred in collaterally estopping Dilip Paul from pressing U.S. claims, and his own claims in the instant case against PBQD and against Battelle.

Arguments on Question No. 9

In the instant case, U.S. MAGISTRATE, Marcia Crone, acted without petitioner's consent or authorization, disregarding the requirements of 28 U.S.C. §636 *et seq.*. She took decisions in the case which has materially affected petitioner's rights. This court should review her role in the case.

Arguments on Question No. 10

In the instant case, Magistrate Crone denied petitioner's motion for compelling discovery. The summary judgment was entered in the instant case in the Houston District Court without allowing any discovery procedure and without following the requirements of Federal Rule of Civil Procedure §12(b)(6) and Rule 56. Those rules require discovery and ascertainment of fact that no triable issues left prior to entering summary judgment. But none of the Federal Rules of Civil Procedures were followed and as a result numerous triable issues surfaced, as can be seen in this petition for certiorari. Those issues should have been resolved prior to the entering of summary judgment in the case.

This is explicitly clear that the states are prohibited from getting involved in defense related activities and in passing any law which will interfere with U.S. contracts. As such, the state courts shall be excluded from adjudicating the instant case involving, nuclear wastes and obligations of U.S. contracts thereof, under this provision of the Constitution.

CONCLUSION

If the decision of the court below is allowed to stand, it would discourage whistle-blowers. The cheating federal contractors will be encouraged to shop around the country to locate their business where the state court, using local laws, would treat them favorably. It will have an undesirable

affect which would enable the states to compete for cheating federal contractors to locate business in their territory.

Petitioner further contends that, in that case, a number of landmark case laws of this court will automatically be reversed. For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20640
Summary Calendar

DILIP KUMAR PAUL,

Plaintiff,

DILIP KUMAR PAUL,

Plaintiff-Appellant,

versus

PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. ET AL.,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas CA-H-92-2429 c/w 92-2792

Before JONES, BARKSDALE and BENAVIDES, Circuit Judges.

PER CURIAM[1]

Dilip Kumar Paul appeals, *pro se*, the dismissal of his *qui tam* action under the False Claims Act, 31 USC §3730, *et seq*. We **AFFIRM**.

(Local Rule 47.5.1. provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expenses on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.)

DILIP KUMAR PAUL,

Plaintiff,

DILIP KUMAR PAUL,

Plaintiff-Appellant,

versus

PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. ET AL.,

Defendants-Appellees

REPORT AND RECOMMENDATION

I. Factual Background

Paul was employed by PB-KBB, an engineering firm, in May 1981. In June 1982, PB-KBB and Parsons, Brinkerhoff, Quade & Douglas, Inc. (PBQD) formed a joint venture (PB/PB-KBB) and entered into a contract with Battelle Memorial Institute (BMI) to provide architectural and engineering design services for the construction of exploratory shafts to investigate geological features of potential nuclear

waste disposal sites in salt formations. BMI assigned the contract to the United States Department of Energy (DOE, and PB/PB-KBB submitted claims for payment to DOE.

Paul was assigned to work as a mining engineer on the joint venture project in June 1982; he was transferred to another division of PB-KBB that July, and was discharged that August (See *Paul v. PB-KBB, Inc.*, 801 S.W.2d 229, 229 (Tex Ct.App.1990). He filed suit against PB-KBB in Texas State Court, claiming that he was wrongfully discharged for being unwilling to commit an illegal act, alleging that the preliminary study regarding the shaft design "could've killed people," and that he was fired for his objections to that project. *Id.* The jury's verdict in favor of PB-KBB was affirmed on appeal in 1990. *Id.* at 230.

In August 1992, Paul filed a qui tam complaint, pursuant to False Claims Act (FCA), against PB-KBB and PBQD, claiming that they knowingly presented or caused to be presented, false or fraudulent claims to the United States government. After he filed a similar complaint against BMI, the two actions were consolidated. The government declined to intervene. The defendants moved to dismiss, asserting, inter alia, that the action was barred by *res judicata*; and the district court agreed. *United States ex rel. Paul v. Parson, Brinkerhoff, Quade & Douglas, Inc.*, 860 F.Supp. 370 (S.D. Tex. 1994).

II. Discussion

Paul contends that res judicata does not bar his action because (1) the state court action was void; (2) the parties to the federal and state actions are not the same; and (3) the two actions do not constitute the same cause of action.

The application of res judicata of law which we review *de novo*, e.g., *Schmueser v. Burkburnett Bank*, 937 F.2d 1025, 1031 (5th Cir. 1991). "When applying the doctrine of *res*

judicata we look to the effect that a Texas state court would give to a prior Texas state court judgment. *Id. at* 1031. Under Texas law,

> "...an existing final judgment rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties in all other actions on the points at issue and adjudicated in the first suit. Further, the rule of *res judicata* in Texas bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in a former action as well as those which were actually tried."

Id. (Quoting *Abbot Laboratories v. Gravis*, 470 S.W. 2d, 639, 642 (Tex. 1971).)

A. State Judgment

Paul contends that the state judgment was not a final judgment on the merits, but instead was void, because the state court lacked subject matter and in personam jurisdiction over indispensable parties; and that PB-KBB fraudulently obtained the judgment. Because he did not raise these issues in the district court, we decline to exercise our discretion to consider them. See *Highlands Ins. Co. v. National Union Fire Ins. Co.*, 27 F.3d 1027, 1031-32 (5th Cir. 1994) (applying, in civil case, plain error analysis of United *States v. Olano*, ____U.S.____, 113 S.Ct. 1770 (1993)), cert. denied, ____U.S.____ 115, S.Ct. 903 (1995).

B. Identity of Parties

Next, Paul contends that there is no identity of parties

The identity-of-parties test is satisfied, not only as to the parties to the earlier litigation, but also as to those in privity with them. See *Soto v. Phillips*, 836 S.W.2d 266, 269 (Tex.Ct.App. 1992).

Paul asserts the PBQD and PB-KBB are jointly and severally liable as joint venturers, and that BMI, as general contractor, is vicariously liable for the actions of its sub-contractors, PB/PB-KBB. As the district court noted, the allegations against the defendants are "virtually identical." 860 F.Supp. at 373. We agree with the district court that there is privity among the defendants. See *Soto,* 836 S.W. 2d at 270 ("When the allegation is that the parties were in a vicarious relationship,...a judgment for the principal bars a later suit against the agent.").

C. Claims Issue

Finally, Paul contends that "the claims in the instant case are different than those tried in the Texas state court." He maintains that he could not have asserted his FCA claims in the state action because federal courts have exclusive jurisdiction over such claims.

> [U]nder Texas law a different cause of aaction is one that proceeds not only on a sufficiently different legal theory but also on a sufficiently different factual footing as not to require the trial of facts material to the former suit; that is, an action that can be maintained even if all the disputed factual issues raised in the plaintiff's

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[2]For the first time on appeal, Paul asserts that the government is a party to the suit and was not in privity with the parties to the state action. Even if we were to exercise our discretion to consider this assertion, we would find it frivolous, because the government declined to intervene in this action.

> original complaint are conceded in defendant's favor.... A different cause of action is not merely a different theory of recovery, it should differ in the theories of recovery, the operative facts, and measure of recovery.

Hogue v. Royse City, TX, 937 F.2d 1249, 1253 (5th Cir. 1991) [internal quotation marks and citations omitted]

Paul's FCA action arises from the same operative facts which gave rise to the prior state action -- activities connected to the contract between BMI and the joint venture regarding preliminary designs for nuclear waste disposal shafts. In his state action, Paul alleged that he was discharged because he refused to commit an illegal act of certifying the plans and specifications for the preliminary design. *Paul, supra* at 229-30. In the instant action, Paul alleges that PBQ&D and BMI participated with PB-KBB in committing the illegal acts of certifying the plans for the preliminary design. Accordingly, the operative facts underlying the two actions are the same. Paul's assertion that he could not have asserted his FCA claims in the state court action is erroneous; state courts have concurrent jurisdiction over FCA claims. See *United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F.Supp. 624, 631-32 (N.D. Ill. 1992).[2]

III. Affirmation

For the foregoing reasons, the judgment is AFFIRMED.

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[3]The parties have filed numerous motions and cross-motions, all of which are denied.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20640

DILIP KUMAR PAUL, et al.,

Plaintiffs,

DILIP KUMAR PAUL,

Plaintiff-Appellant,

versus

PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. ET AL.,

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas CA-H-92-2429 c/w 92-2792

ON PETITION FOR REHEARING
(July 10, 1995)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges

PER CURIAM: DENIED

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.
ENTERED FOR THE COURT:

---------s---------

RHESA H. BARKSDALE
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA) ex rel. DILIP KUMAR PAUL,)	CIVIL ACTION
Plaintiff,)	No. H-92-2429
v.)	(Consolidated with Civil Action No. H-92-2792
PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. and PB-KBB,)	
Defendants.)	

ORDER

Pending before the Court is the Motion to Dismiss, or in the alternative, motion for Summary Judgment and Renewal of Request for Sanctions filed by defendants Parsons, Brinkerhoff, Quade & Douglas, Inc. (PBQ&D). Having considered the motion, submissions, and the applicable law, the Court determines that the motion to dismiss should be granted and request for sanctions denied. The Court further determines that defendant Battelle Memorial Institute (BMI) should be dismissed sua sponte for the same reasons stated herein.[1]

Plaintiff Dilip Kumar Paul (Paul) initiated this cause of action pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. §3730, *et seq.*, against PBQ&D, and PB-KBB. Although the False Claims Act provides the United States

[1] A district court may dismiss a case upon its own motion. ------ *v. Brazos County*, 981 F.2d 237, 242-43 (5th Cir.)43

Government the opportunity to intervene in a qui tam suit brought under the Act, the United States elected not to intervene in this case. See Document 15. In the complaint, Paul alleges that the defendants "knowingly present[ed], or cause[d] to be presented, to an officer or employee of the Government...a false or fraudulent claim for payment or approval." 31 U.S.C. §3726(1). A similar cause of action brought against BMI was consolidated with the instant case.

Paul was first employed by PB-KBB, an engineering firm, in June 1981. In June 1982, PB-KBB and PBQ&D formed a joint venture (PB/PB-KBB) to function as subcontractor to BMI. Since 1978 BMI has been responsible for the management of the United States Department of Energy's (DOE) National Waste Terminal Storage Program. PB/PB-KBB was employed by BMI to design an exploratory shaft for a nuclear waste storage project for the DOE. On October 7, 1982, the DOE approved the subcontract and on November 23, 1985, BMI assigned the subcontract to the DOE. As a result of the assignment, PB/PB-KBB submitted all of its claims for payment directly to the DOE. It is the submission of these claims for payment by PB/PB-KBB to DOE that Paul alleges were fraudulent and form the basis of his False Claims Act causes of action.

When the joint venture was formed in June 1982, Paul was selected as a mining engineer on the project. Paul was instructed by PB- KBB to perform a trade-off ventilation study. *Paul v. PB-KBB, Inc.*, 801 S.W. 2d 229 (Tex. App.--Houston [14th Dist.] (1990), writ denied).[2] By mid-July 1982, Paul had not completed the trade-off study and was transferred to the "Infrastructure" division of PB-KBB. During the first part of August 1982, Paul was discharged.

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[2]This case refers to a state court suit filed by Paul against PB- KBB.

Following his dismissal, Paul filed suit against PB-KBB in Texas state court alleging that he was wrongfully discharged for his unwillingness to commit an illegal act. *Id.*[3] Paul claimed that "the preliminary study called for one shaft rather than two and [the preliminary study] design 'could've [sic] killed people.'" *Id.* Paul argued that he was fired for his objections to the project. *Id.* After a jury verdict for Paul's employer was affirmed by the Texas Court of Appeals, Paul filed this complaint.

PBQ&D and PB-KBB contended that this case should be dismissed on the following basis: (1) *res judicata*; (2) the lack of federal court jurisdiction; (3) the failure of Paul to allege "fraud" and "guilty intent" under the False Clams Act; (4) the failure of Paul to state a cause of action for retaliation under the False Claims Act; and the expiration of the statute of limitations. The Court finds that because Paul could have raised the False Claims Act allegations contained in the complaint when he filed the prior state action, the principle of res judicata supports dismissal of his complaint in this action.

When a decision is rendered on the merits of a case by a court of competent jurisdiction, the judgment is conclusive for the parties and their privies "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Nevada v. United States*, 443 U.S. 109, 129-30 (1983).

As the prior lawsuit was brought in Texas state court, this court will give full faith and credit to the state court judgment pursuant to 28 U.S.C. §1738, and will apply in its evaluation of the effect res judicata has on the complaint. *Hoque v. Royse City, Tex.*, 939 F.2d 1249, 1252 (5th Cir. 1991).

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[3]Paul has filed two other causes of action against PB-KBB. See Document #30 at 3-4.vi

In order for res judicata to apply, four requirements must be met: (1) the parties must be identical in both suits; (2) the prior judgment must have been rendered by a court of competent jurisdiction on the merits; and (4) the same cause of action must be involved in both cases. *Eubanks v. F.D.I.C.*, 997 F.2d 166, 169 (5th Cir. 1992). In this case, the second and third requirements have been met as the prior lawsuit was adjudicated by the state court and affirmed by the Texas Court of Appeals. See *Paul, supra* at 229.

The first and fourth requirements for the application of res judicata, that "the parties...be identical in both suits," and that "the same cause of action...be involved in both cases," are the two issues for consideration in review of the defendants' motion to dismiss. *Eubanks, supra* at 169.

Pursuant to Texas law, the first requirement for the application of res judicata to bar a subsequent cause of action, the "identity of parties" test, does not demand strict identity. Rather, parties in the subsequent action are considered "identical" to parties in the previous action if the non-parties are in privity with the earlier parties. *Getty Oil v. Insurance Co. of N. America*, 845 S.W.2d 794, 800 (Tex. 1992) (stating that there is no general definition of privity that can be automatically applied in all *res judicata* cases; the circumstances of each case must be examined). Having examined the relationship between PBQ&D and PB-KBB, this court finds the requisite privity to bar this complaint. In addition, the court finds privity between BMI the general contractor, and PBQ&D and PB-KBB, the subcontractors.

PBQ&D has asserted two related grounds to support its privity argument with PB-KBB. First, PBQ&D argues that its liability is derivative of PB-KBB's, and therefore the False Claims Act cause of action against PBQ&D should be barred. PBQ&D cites Texas law which holds that "where the rights and liabilities of a party are derivative, a judgment

derived may be set up as a bar in the second suit." *Lemon v. Spann*, 633 S.W.2d 568, 570 (Tex. App.--Texarkana 1982, writ ref'd n.r.e.) .

PBQ&D's second argument to establish privity centers on the fact that PBQ&D was one of the joint venturers, along with PB-KBB, to which BMI subcontracted the design of the exploratory shaft facility. The gravamen of Paul's complaint is that PBQ&D and PB- KBB acted together to defraud the government. Paul continually refers to PBQ&D, BMI, and PB-KBB simply as "defendants" when alleging wrongdoing. Paul's allegations against the defendants are virtually identical. Thus, PBQ&D maintains that privity exists between the defendants and *res judicata* bars Paul's complaint.

PBQ&D also claims that because it is joined as a defendant with PB-KBB in the complaint, it is in a vicarious relationship with PB-KBB. In situations of vicarious liability, a judgment for one of the parties in the vicarious relationship bars a later action against the other. Thus, PBQ&D maintains that Paul's complaint against it should be dismissed as a result of PB-KBB's success in the state court action. *Soto v. Phillips,* 836 S.W.2d 266, 269 (Tex. app.--San Antonio 1992) writ denied (citing Restatement [Second] of Judgments 51(1) (1982)). As a general contractor, BMI is also in a vicarious liability relationship with its subcontractor, PB-KBB. See e.g., *United States v. Blair*, 321 U.S. 730 (1944).

There are two exceptions to the rule that bar an unsuccessful plaintiff from reasserting a claim against a subsequent defendant alleged to be vicariously liable to the original defendant. Such a claim may not be reasserted unless: (1) the claim asserted in the second action is based upon grounds that could not have been asserted against the defendant in the first action; or (2) the judgment in the action was based on a defense that was personal to the

is a defendant in the first action. Restatement (Second) of Judgments §51(1) (1982). In this case, the complaint is based upon Paul's allegation that PB/PB-KBB and BMI submitted "a false or fraudulent claim for payment or approval [to the DOE]." §31 U.S.C. §3729(1). Paul alleged in the prior lawsuit that his certifying design plans for the project, which he believed were dangerous, would have constituted a violation of §22.05 of the Texas Penal Code, which proscribe "reckless conduct." Paul alleges that his refusal to certify the plans resulted in his termination. In addition, if Paul would have certified the project design,he would have played a role in the submission of the allegedly false claim to the DOE. Given the similarity between the two claims, the grounds for this complaint in this case could have been asserted in the first action.

The second exception also does not apply. The concept of "personal defense" is addressed by the Texas Business and Commercial Code in its explanation of the rights of the holder in due course of a negotiable instrument. A holder in due course may take an instrument free from all defenses of any party to the instrument with whom the holder has not dealt, except personal defenses. Tex. Bus. & Comm. Code §3.305 (1967).[4] Because PB- KBB's defense to the wrongful discharge action was not a personal defense, the second exception does not apply.

---

[4]The Texas Business and Commercial Code defines the five personal defenses as: (1) Infancy...; and (2) such other incapacity, or dures, or illegality of the transaction, as renders the obligation the party a nullity;... (3) ...misrepresentation [that] has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms;... (4) discharge in insolvency proceedings; and (5) any other discharge of which the holder has notice when he takes the instrument. Tex. Bus & Comm. Code §3.304 (1967).

Res judicata operates on the principle that any cause of action which arises out of the same facts should, if practicable, be litigated in the same suit. *Barr*, 837 F.2d at 631. A different cause of action has been defined by Texas courts as "one that proceeds not only on a sufficiently different legal theory but also on a sufficient different factual footing." *Hoque,* 937 F.2d at 1253. To be considered "different," the cause of action must differ in the theories of recovery, the operative facts, and the measure of recovery. *Id.*

In examining the above three factors, Texas courts have utilized the transactional approach to claim preclusion. *Barr*, 837 F.2d at 631. The transactional approach "provides that a final judgment an action extinguishes the right to bring suit on the transaction, or a series of connected transactions, out of which the action arose." *Id.* In analyzing the transactional approach, factors to be considered are: (1) whether the facts are related in time, space, origin, or motivation; (2) whether they form a convenient trial unit; and (3) whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage. *Id.* (Quoting Restatement of Judgment 24(2).)

In this case, the complaint arose form the same operative facts that gave rise to the prior lawsuit. The claims in Paul's complaint could have been adjudicated with the prior lawsuit, forming a convenient trial unit. As aforementioned, Paul alleged in the prior lawsuit that PB-KBB was engaged in illegal activities and his failure to participate in those activities led to his discharge. Paul alleges that PBQ&D and BMI participated with PB-KBB in the illegal acts. Although the complaint asserts a new theory and measure of recovery, the alleged filing of false or fraudulent claims, the operative facts are the same as those in the prior lawsuit.

The second factor of transactional approach, whether the two clams could have formed a "convenient trial unit, "

The following is a jurisdictional question. Whether the state court had jurisdiction over the federal False Claims Act claims is a question of first impression in this circuit. After a thorough review of other jurisdictions, it appears that only one other court has decided the question whether there is exclusive federal jurisdiction over cases brought pursuant to the False Claims Act. In *United States ex rel. Hartigan v. Palumbro Bros., Inc.*, the court held that there is concurrent jurisdiction over the False Claims Act cases.[5]

In *Tafflin v. Levitt*, 493 U.S. 455 (1990), the Supreme Court discussed concurrent jurisdiction in holding that federal civil RICO suits could be brought in state court. The Court recognized that it has "consistently held that state courts have inherent authority and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Id.* at 460. State courts are courts of general jurisdiction. When a federal statute intends that claims arising under it be litigated in a specific jurisdiction, the statute will explicitly state that suit may be brought "only" in federal court, or that the jurisdiction mentioned by the statue shall be "exclusive." *Id.* at 801 (Scalia, J. concurring). If exclusive jurisdiction is neither express nor implied by the statute, state courts will have concurrent jurisdiction. *Claflin v. Houseman*, 93 U.S. 130, 136 (1876).

The False Claims Act states that an action arising under it "may" be brought in federal court. 31 U.S.C. §3732 (1876). Thus, pursuant to the language of the statute, there is concurrent jurisdiction between the federal and state courts. See *Charles Dowd Box Co. v. Courtney*, 638 U.S. 502 (1962).

Finally, the third element of the transactional approach to claim preclusion states that future claims will be barred if it is reasonable to presume that the parties would expect the two actions to be treated together in the original case.

---

[5] 597 F.Supp. 624 (N.D. Ill. 1992)

Inasmuch as the facts and claims in the state and federal cases are almost identical, it is apparent that the two cases could have been tried together. See *Ocean Insurance Co. v. Fields*, 18 F.Cas. 532 (C.D.D. Mass. 1841) (No. 10, 406). Therefore, based on the foregoing, the Court hereby

ORDERS that the Motion to Dismiss is GRANTED and the request for Sanctions is DENIED. It is further ORDERED that the complaint against BMI is DISMISSED. All relief not specifically granted herein is DENIED

SIGNED at Houston, Texas, on this 29 day of July, 1994.

----s----

DAVID HITTNER

United States District Judge.

THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA) ex rel. DILIP KUMAR PAUL,	)	CIVIL ACTION
Plaintiff,	)	No. H-92-2429
v.	)	
PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC. and PB-KBB,	)	
Defendants.	)	

ORDER

Defendants' Motion for Protective Order (Docket Entry #33) is GRANTED.

Plaintiff's Motion to Compel Discovery (Docket Entry #39) is DENIED.

It is ORDERED that Defendants shall respond to Plaintiff's Request for Production of Documents on or before 30 days after the date the Court rules on defendants' Motion to Dismiss.

SIGNED at Houston, Texas, on this 8th day of February, 1994.

----S----
Marcia A. Crone
United States Magistrate Judge

Supreme Court, U.S.
FILED
DEC 21 1995
CLERK

No. 95-919

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1995

UNITED STATES ex rel. PAUL,
Petitioner,

v.

PARSONS, BRINCKERHOFF, QUADE & DOUGLAS, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT BATTELLE MEMORIAL INSTITUTE, PROJECT MANAGEMENT DIVISION

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39 pp

QUESTIONS PRESENTED

I. Whether the jurisdictional provisions of the False Claims Act ("FCA"), 31 U.S.C. § 3730(b) (1994), which provide that an action under the FCA "may be brought in any judicial district . . ." (emphasis added), divest state courts of jurisdiction to hear cases brought under the FCA.

II. If not, whether the district court clearly erred in its finding that Petitioner's FCA action was barred by the doctrine of res judicata, as governed by Texas law, where: (1) Petitioner had already fully litigated his employment dismissal in a prior state-court action in Texas; (2) the prior state-court action was a final judgment on the merits by a court of competent jurisdiction; (3) Respondent, Battelle Memorial Institute, Project Management Division ("BMI"), was, for purposes of res judicata, in privity with the defendant in the prior state-court action; (4) the prior state-court action and the FCA suit arose from the same operative facts; and (5) the FCA claims could have been brought with the prior state-court action.

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JURISDICTION

A final decision was issued by the United States District Court for the Southern District of Texas on August 1, 1994, and that decision was affirmed by the United States Court of Appeals for the Fifth Circuit on April 28, 1995. United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 860 F. Supp. 370 (S.D. Tex. 1994), aff'd without op. 53 F.3d 1282 (5th Cir. 1995). Petitioner filed a petition for rehearing which was denied by the Fifth Circuit on July 10, 1995. Petitioner then filed the instant Petition for Writ of Certiorari ("Pet.") within ninety days of that denial. Accordingly, the petition was filed timely under Rule 13.1 of the Supreme Court Rules. See 28 U.S.C. § 1254 (1988).

Although this Court has jurisdiction to review this case under Rule 13.1 and 28 U.S.C. § 1254, BMI continues to assert -- as it did before the district court and the Fifth Circuit -- that the federal courts lack subject matter jurisdiction over this case. Briefly, under the FCA, the federal courts lack jurisdiction over any cause of action arising prior to 1986 if the "action is based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982), amended by 31 U.S.C. § 3730(e)(4) (1994). For claims arising after 1986, the courts have no jurisdiction over actions based upon publicly disclosed allegations or transactions unless the relator is the "original source" of that information. 31 U.S.C. § 3730(e)(4) (1994). As BMI asserted before the lower courts, Petitioner's FCA suit contains no information that the Government did not have when the action was

brought, all of Petitioner's allegations had been publicly disclosed when the action was brought and Petitioner is not an "original source." Consequently, there is no federal court subject matter jurisdiction over this action.

PROCEDURAL HISTORY

A. District Court Proceedings

Respondent BMI is a non-profit charitable trust organized as a non-profit corporation under the laws of the State of Ohio.[1/] Its primary activity is the performance of research, development, management, and technical services on a contract basis for industrial, federal, state, and local governmental clients. Petitioner Paul is an engineer who, in 1982, worked for Respondent PB-KBB, one of two companies constituting a joint venture that was a subcontractor to BMI. The joint venturers were Respondents PBQD, a New York corporation, and PB-KBB, a Delaware corporation.

1/ In addition to BMI, a listing of the parties in the lower court proceedings, as required by Rule 14.1(b) of the Supreme Court Rules, includes: (1) Petitioner Dilip Kumar Paul ("Paul"); (2) Respondent P.B.-K.B.B., Inc. ("PB-KBB"); and (3) Respondent Parsons, Brinckerhoff, Quade & Douglas, Inc. ("PBQD"). Pursuant to Rule 29.1 of the Supreme Court Rules, BMI states that it has no parent companies, however, it has two non-wholly owned subsidiaries: (1) Geosafe Corporation; and (2) Research Insurance Company Limited. Both of these subsidiaries are approximately 99% owned by BMI.

On August 10, 1992, Paul filed a complaint in the United States District Court for the Southern District of Texas under the qui tam provisions of the FCA, 31 U.S.C. § 3730(b) (1994), against PB-KBB and PBQD. On September 11, 1992, Paul filed a qui tam complaint against BMI containing virtually identical allegations. On April 1, 1993, pursuant to 31 U.S.C. § 3730(b)(4)(B), the United States filed a Notice of Election Not to Intervene in this action. On July 14, 1993, the district court ordered the consolidation of Paul's complaint against PBQD and PB-KBB with the action against BMI.

On November 19, 1993, BMI filed a motion to dismiss Paul's suit, arguing that Paul's action should be dismissed because: (1) the suit was barred by res judicata; (2) there was no federal court subject matter jurisdiction; (3) Paul failed to state a cause of action upon which relief could be granted; and (4) most of Paul's action was barred by the statute of limitations.

The district court granted BMI's motion, finding that "because Paul could have raised the [FCA] allegations contained in the complaint when he filed [a] prior state court action, the principle of res judicata supports dismissal of his complaint . . . ." Paul, 860 F. Supp. at 372. Specifically, in the prior state-court action, discussed more fully below, Paul brought suit against PB-KBB in a Texas state court, claiming that PB-KBB improperly terminated his employment "because he refused to commit an illegal act." Paul v. P.B.-K.B.B., Inc., 801 S.W.2d 229, 229 (Tex. App. -- Houston [14th Dist.] 1990, writ denied). Pursuant to a jury trial, a verdict was returned in favor of PB-KBB,

which was subsequently affirmed. Id. at 230. Based upon that prior state-court ruling, the district court concluded that:

> [i]n this case, the complaint arose from the same operative facts that gave rise to the prior lawsuit. The claims in Paul's complaint could have been adjudicated with the prior lawsuit, forming a convenient trial unit. [] Paul alleged in the prior lawsuit that PB-KBB was engaged in illegal activities and his failure to participate in these activities led to his discharge. Paul alleges that PBQ&D and BMI participated with PB-KBB in the illegal acts. Although the complaint asserts a new theory and measure of recovery, the alleged filing of false or fraudulent claims, the operative facts are the same as those in the prior lawsuit.

Paul, 860 F. Supp. at 374. PB-KBB was dismissed on the basis of res judicata, and BMI and PBQD, as privies to PB-KBB for the purpose of the prior state-court action, were similarly dismissed. Id. at 373.

B. Court Of Appeals Proceedings

On August 30, 1994, Paul filed a notice of appeal to the United States Court of Appeals for the Fifth Circuit. Among numerous contentions, Paul primarily argued that the district court's ruling was erroneous because: (1) the prior state-court judgment was not a "final judgment on the merits" since (a) the Texas state court lacked subject matter and in personam

jurisdiction over certain purportedly "indispensable parties" (whom Paul had not joined as defendants) thus rendering the judgment improper, and (b) according to Paul, PB-KBB fraudulently obtained the prior state-court judgment; (2) the res judicata bar is inappropriate because PBQD, BMI and the United States were not parties to the state-court action; (3) the FCA claims and the prior state-court action do not constitute the same cause of action; and (4) jurisdiction over FCA suits lies solely in the federal courts and, therefore, he could not have included his FCA claims in his prior state-court action.

On April 28, 1995, the Fifth Circuit affirmed the district court ruling. United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., 53 F.3d 1282 (5th Cir. 1995) (unpublished opinion). In an unpublished opinion, the Fifth Circuit declined to address Paul's collateral challenges to the prior state-court action stated in (1) above, because Paul had failed to raise those issues in the district court and, thus, could not raise them for the first time on appeal. United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc., No. 94-20640, slip op. at 3-4 (5th Cir. Apr. 28, 1995). The court of appeals likewise declined to address Paul's argument that because the United States is a party to his FCA suit but was not a party to the prior state-court action, there could be no res judicata because Paul also had not raised this issue before the district court. Id. The court noted, however, that "[e]ven if we were to exercise our discretion to consider this assertion, we would find it frivolous, because the Government declined to intervene in this action." Id.

The Fifth Circuit also rejected Paul's contention that, because PBQD and BMI were not parties to the

prior state-court action, they could not assert the bar of res judicata. Id. at 4. Finally, the Fifth Circuit rejected Paul's contention that the FCA provides for exclusive federal court jurisdiction and, therefore, prohibited Paul from bringing his FCA claims in the prior state-court action. Id. at 5-6.

Even though there are no conflicting court decisions with the instant case, there are no important questions of federal law, and this case involves nothing more than a routine application of settled, Texas state law of res judicata, Paul now seeks the grant of certiorari by this Court, presenting all of the same arguments considered -- and rejected -- by the Fifth Circuit.

BACKGROUND FACTS

A. Contract History

From 1965 to the present, BMI has provided research and development services to the U.S. Department of Energy ("DOE") as the contractor operating the Pacific Northwest Laboratories located in Richland, Washington. On April 28, 1978, BMI was assigned responsibility for the management of DOE's National Waste Terminal Storage Program. In particular, BMI was directed to and did establish a new Project Management Division responsible for (1) identification of potential sites with salt formations and/or other geological formations within the United States suitable for development for potential nuclear waste repositories, and (2) the coordination and direction of the development of criteria and specific technologies required for exploration, design, licensing, construction, operations, and monitoring of these repositories.

Effective June 14, 1982, BMI and a joint venture (comprised of PBQD and PB-KBB) known as Parsons Brinckerhoff/P.B.-K.B.B. ("PB/PB-KBB") entered into a subcontract, pursuant to which PB/PB-KBB was to provide architectural and engineering design services relating to the construction of exploratory shafts that would be used to investigate the geological features of potential nuclear waste disposal sites in salt formations (the "Subcontract"). On October 7, 1982, DOE approved the Subcontract.

B. Litigation History

Paul was hired by PB-KBB in May 1981. In June 1982, he was assigned to work on the Exploratory Shaft Facility design, the project encompassed by the Subcontract. Paul alleges that he soon concluded the preliminary design specifications were inconsistent with requirements under federal mine safety standards. Paul claims that he informed his supervisors, orally and in writing, of his concerns. According to Paul, these acts resulted in his transfer to another division at PB-KBB and, ultimately -- twelve days after drafting a memorandum summarizing his concerns -- to his discharge.

In 1983, Paul brought a Title VII action in the United States District Court for the Southern District of Texas against PB-KBB, Civil Action No. H-83-3409, alleging that he was discharged on the basis of his national origin. That action was dismissed without prejudice by stipulation of the parties on June 7, 1984. Paul then filed an action under the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 801 et seq. (1994), with the Secretary of Labor, wherein he argued that, in violation of § 815(c)(1) of the Mine Act, he was fired because of his safety

complaints. Paul v. P.B.-K.B.B., Inc., 3 MSHC 2006, 2007 (1985). The Secretary of Labor rejected Paul's claim. Id. Paul appealed the Secretary's decision to the Federal Mine Safety and Health Review Commission ("the Commission"). Id. at 2008. The Commission, however, upheld the Secretary's decision. Id. Paul then appealed the Commission's ruling to the United States Court of Appeals for the District of Columbia Circuit, which upheld the Secretary. Paul v. Federal Mine Safety and Health Review Comm'n, 812 F.2d 717, 718 & 720 (D.C. Cir.), cert. denied, 483 U.S. 1023 (1987).

Undeterred, Paul then brought an action in Texas state court, alleging that he was wrongfully discharged for his unwillingness to commit a criminal act. Paul v. P.B.-K.B.B., Inc., 801 S.W.2d 229 (Tex. App. -- Houston [14th Dist.] 1990, writ denied). In that action, Paul contended that "the preliminary study [prepared by PB-KBB] called for one shaft rather than two and that this design 'could've killed people.'" Id. at 229. Paul argued that, as the engineer, he would be called upon to certify the plans and specifications, and doing so would be a violation of § 22.05 of the Texas Penal Code which proscribes "reckless conduct." Id. According to Paul, it was these objections to the project, that resulted in his termination. Id. at 230. After trial, the jury found that Paul was not fired solely because he refused to commit an illegal act. On appeal, the verdict was affirmed. Id. at 230.

Paul attempted to dress up his losing state-court action in new federal clothing by filing the instant action, but the same operative facts underlay both actions. As in the state-court action, where Paul argued that the preliminary shaft design was a violation of applicable safety regulations and "could've

killed people," id. at 229-30, Paul bases his FCA suit upon the same allegations that the design was "extremely dangerous" and "could kill people." See Compl. at ¶ 5. Further, in the state-court action, Paul claimed that he was fired in response to "a written memorandum of objections he leveled at the safety of the project." Paul, 801 S.W.2d at 230. Similarly, in his FCA action, Paul contends that he wrote a memorandum summarizing the "dangerous design problems," and he was fired. See Compl. at ¶ 7. Accordingly, Paul's FCA suit is no more than an attempt to relitigate his prior state-court action.

SUMMARY OF ARGUMENT

Paul's petition presents two basic issues, neither of which justifies the issuance of the writ of certiorari. The first issue is whether state and federal courts have concurrent jurisdiction over actions brought under the qui tam provisions of the FCA. Every court to consider this issue, including the courts below, have concluded that FCA jurisdiction is concurrent. Furthermore, this Court has repeatedly held that statutes such as the FCA, which provide that actions "may be brought" in the federal courts, do not create exclusive federal court jurisdiction, unless there is either an unmistakable implication from the statute's legislative history that Congress did not want state courts to exercise jurisdiction over the federal action or else a clear incompatibility between state-court jurisdiction and the federal interest advanced by the statute. No such factors are present in this case. This issue, therefore, does not warrant discretionary review by this Court.

Paul's second issue, the application of the doctrine of res judicata to the facts of this case, likewise fails to justify the issuance of the writ of

certiorari. Because the prior judgment was rendered by a Texas state court, Texas law of res judicata controls the outcome of this case. In other words, the lower courts' legal conclusions on res judicata present no federal issues. Furthermore, the lower courts properly applied the facts of this case to the controlling Texas law. The petition for writ of certiorari should be denied.

ARGUMENT

I. The Lower Courts Correctly Found That This Action Is Barred By Paul's Failure To Bring His False Claims Act Action With The Prior State-Court Action

A. State And Federal Courts Have Concurrent Jurisdiction Over False Claims Act Suits

Paul argues that the lower courts erroneously ruled that the FCA provides for concurrent federal and state court jurisdiction. Pet. 7. Besides presenting a litany of irrelevant constitutional provisions and caselaw quotations, Paul presents no basis for this assertion. Instead, the statutory language of the FCA indicates that there is concurrent federal and state court jurisdiction over FCA suits. In addition, every court to consider this issue has agreed that jurisdiction over FCA actions is concurrent.

In Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473 (1981), this Court set forth the following rule when state courts have jurisdiction in cases addressing federal laws: "state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling

incompatibility between the federal claim and state-court adjudication." Id. at 477-78. In assessing the issue of concurrent/exclusive jurisdiction, the Court noted that a court should "begin[] with the presumption that state courts enjoy concurrent jurisdiction," and this presumption can be rebutted only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests." Id. at 478; see also Tafflin v. Levitt, 493 U.S. 455, 460-61 (1990); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 507-08 (1962).

In United States ex rel. Hartigan v. Palumbo Bros., Inc., 797 F. Supp. 624, 631-33 (N.D. Ill. 1992), which was cited by both the district court and the Fifth Circuit in the instant action, the Gulf Offshore-Tafflin factors were specifically applied to the FCA jurisdictional analysis. In Hartigan, the court first reviewed the FCA jurisdictional provision. 31 U.S.C. § 3732 (1994). The court found that the statutory language -- providing that "[a]ny action under section 3730 may be brought in any judicial district . . . ," 31 U.S.C. § 3732 (emphasis added) -- "is plainly permissive." Hartigan, 797 F. Supp. at 631. The court's conclusion is supported by the caselaw. Compare 31 U.S.C. § 3732 (FCA action "may be brought in any judicial district . . . ") with Charles Dowd Box Co., 368 U.S. at 507 (statute providing that action "may" be brought in federal court allows for concurrent jurisdiction between federal and state courts) and Tafflin, 493 U.S. at 471 (Scalia, J. concurring) (provisions providing for exclusive jurisdiction "specifically recite that suit may be brought 'only' in federal court" or that jurisdiction shall be "exclusive").

The court in Hartigan found "no evidence that Congress addressed or even considered the question of concurrent state court jurisdiction over FCA claims [or] that Congress, in its deliberations, affirmatively intended to confer exclusive jurisdiction over such claims on the federal courts." Hartigan, 797 F. Supp. at 632; see also Tafflin, 493 U.S. at 463 ("[L]egislative silence counsels, if not compels, us to enforce the presumption of concurrent jurisdiction.").

The court in Hartigan also assessed whether there was a "clear incompatibility between state-court jurisdiction and federal interests." Hartigan, 797 F. Supp. at 632 (quoting Tafflin, 493 U.S. at 461). Such incompatibility, according to the court, would be influenced by the following factors: "the desirability of uniform interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiar federal claims." Id. (quoting Tafflin, 493 U.S. at 464). The court found all of these factors supported concurrent jurisdiction over FCA suits. Id. First, because FCA claims are civil and not criminal, "there is no overriding need for uniform interpretation." Id.; see also Tafflin, 493 U.S. at 464-65 (finding concurrent jurisdiction over civil RICO actions "creates no significant danger of inconsistent application of federal criminal law"). Second, the court found that FCA suits are premised upon allegations of fraud which "are the type of claims over which state courts presumably have great expertise." Hartigan, 797 F. Supp. at 632; see also Gulf Offshore Co., 453 U.S. at 484 (recognizing that state-court judges have greater expertise in adjudicating personal injury and contract actions). Then, the court rejected the argument that the FCA's "procedural mechanisms" support exclusive federal jurisdiction. Hartigan, 797 F. Supp. at 632; see also Tafflin, 493 U.S. at 466 ("[W]e have previously

found concurrent state court jurisdiction even where federal law provided for special procedural mechanisms similar to those found in RICO."). Finally, the court noted that concurrent jurisdiction over FCA suits advances the policies underlying the statute by encouraging reporting of fraud. Hartigan, 797 F. Supp. at 632. Consequently, the court ruled that jurisdiction under the FCA is concurrent.

Other cases similarly support the finding of concurrent jurisdiction over FCA suits and, additionally, the application of the doctrine of res judicata where the FCA action could have been brought in a prior state-court action. See United States ex rel. Hindo v. University of Health Sciences/The Chicago Medical Sch., 1993 U.S. Dist. LEXIS 17306, at *4 (N.D. Ill. Dec. 7, 1993) (finding "state and federal courts have concurrent jurisdiction over claims brought under the [FCA]," and the plaintiff could have brought the FCA claim with the prior state-court action); see also Robbins on behalf of United States v. Desnick, 1991 U.S. Dist. LEXIS 418 (N.D. Ill. Jan. 10, 1991) ("Because Robbins could have brought both the FCA claim and the state claim for medical malpractice in the same lawsuit, res judicata prevents Robbins from going forward with this action.").

Despite this caselaw, Paul argues that the legislative history of the FCA supports exclusive federal court jurisdiction. Pet. 15-17. In particular, Paul cites the portion of the Senate Report from the 1986 amendments to the FCA which states that "[u]nlike most other types of crimes or abuses, fraud against the Federal Government can be policed by only one body -- the Federal Government. State and local law enforcement are normally without jurisdiction where Federal funds are involved." See False Claims

Amendments Act of 1986, Pub. L. No. 99-562, 1986 U.S.C.C.A.N. (99 Stat.) 5266 at 7. This statement has nothing to do with the issue of court jurisdiction over FCA claims, but relates solely to the law enforcement agencies assigned responsibility for enforcing federal matters, and the fact that such resources are limited, requiring the utilization of the FCA's qui tam provisions to detect fraud. Indeed, this quotation, read in context, arguably indicates that Congress supports concurrent jurisdiction as a further means of supplementing the limited federal resources to detect fraud.

Paul then presents two other quotations of legislative history from the 1986 Amendments -- one relating to a proposal to permit state and local governments to join state law claims with FCA actions brought in federal court and one that would have provided a uniform federal standard for the employment of pre-judgment attachment remedies (rather than following state law standards) under actions brought by the government. Pet. 16. Neither of these proposed amendments, however, were ultimately included in the adopted amendments to the FCA.

Finally, Paul contends that "there is a clear and definite incompatibility of [the FCA's] intent and states' interest in the adjudication of the [FCA]." Pet. 17. Without citation, Paul bases this contention upon the "many state agencies [that] have become defendants in cases arising out of the [FCA]." Id. at 17. Essentially, Paul argues that "[t]he states have [a] conflict-of-interest when adjudicating federal funds." Id. at 17. Yet, even accepting Paul's unsupported assertions that a state court might be hostile to a FCA suit, the federal government still has the option to

intervene in the litigation and refile it in a federal court. Consequently, there is no "unmistakable implication from legislative history" that Congress intended to divest state courts of concurrent jurisdiction over FCA suits, Gulf Offshore Co., 453 U.S. at 478, and there is no matter here justifying this Court's attention.

B. The Lower Courts' Claim Preclusion Analyses Properly Relied Upon The Law Of The State Of Texas

Paul argues that the district court and the Fifth Circuit "erred in their summary rulings that Texas state laws would govern in deciding the instant case." Pet. 20. Paul, however, presents no pertinent caselaw and ignores the established principle -- mandated by the Full Faith and Credit Clause of the United States Constitution, U.S. Const. art. IV, § 1, and 28 U.S.C. § 1738 (1988) -- that a federal district court "give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so." Allen v. McCurry, 449 U.S. 90, 96 (1980); see also Hogue v. Royse City, 939 F.2d 1249, 1252 (5th Cir. 1991) ("In determining whether res judicata bars [] federal claims as a matter of law, this Court must give the [Texas] court judgment the same preclusive effect as would be given that judgment under Texas law."). Accordingly, both the district court and the Fifth Circuit properly looked to the law of Texas in assessing the preclusive effect of the prior state-court judgment, and there is no issue for this Court to consider.

C. The Lower Courts Properly Found That Paul's Instant False Claims Act Suit Constitutes the Same Cause of Action As His Prior State-Court Claim

Paul contends that the district court and Fifth Circuit erred in applying the doctrine of res judicata because "[t]he claims in the instant case were never litigated and could not be done in the Texas state court." Pet. 22. The crux of Paul's argument -- that his FCA allegations were not litigated in the prior action -- is irrelevant under the doctrine of res judicata. Although the doctrine of collateral estoppel requires that "the facts sought to be litigated in the second action were fully and fairly litigated in the prior action," Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984), the doctrine of res judicata provides a "bar [to] all claims that were or could have been advanced in support of the cause of action." Langston v. Insurance Co. of N. America, 827 F.2d 1044, 1047 (5th Cir. 1987) (emphasis added); see also Abbott Labs. v. Gravis, 470 S.W.2d 639, 642 (Tex. 1971) ("[T]he rule of res judicata in Texas bars litigation of all issues connected with a cause of action or defense which, with the use of diligence, might have been tried in a former action as well as those which were actually tried."). The lower courts' rulings were premised upon the bar of res judicata, not collateral estoppel, and Paul's objection to the application of Texas res judicata principles must therefore be rejected.

Paul also attempts to refute the lower courts' conclusions that Paul's FCA claims constitute the same cause of action as the prior state-court action. Pet. 22-23. Yet, in so doing, Paul presents no law and fails to address the legal reasoning of either the district court

or the Fifth Circuit. Instead, Paul attempts to differentiate the instant case by arguing that the FCA claims occurred through the year 1988, well beyond the date of his 1982 dismissal. Pet. 22. Further, he contends that the facts surrounding the FCA claims occurred in locations other than Houston, Texas, the location from where Paul was dismissed in 1982. Pet. 19-20 & 22-23. Neither of these contentions, however, discredit the lower courts' holdings.

"Under Texas law, an existing final judgment rendered upon the merits, by a court of competent jurisdiction is conclusive of the rights of the parties in all other actions on the points at issue and adjudicated in the first suit." Hogue, 939 F.2d at 1252. The decision in the state court was a final judgment on the merits by a court of competent jurisdiction. See infra Section E. Accordingly, the issue is whether the instant action and the prior state-court action constitute the same cause of action.

"[W]hether two lawsuits constitute 'different causes of action' must be an objective determination. A different cause of action is not merely a different theory of recovery; it should differ in 'the theories of recovery, the operative facts, and the measure of recovery.'" Flores v. Edinburg Consol. Indep. Sch. Dist., 741 F.2d 773, 779 (5th Cir. 1984) (quoting Dobbs v. Navarro, 506 S.W.2d 671, 673 (Tex. App. -- Houston [1st Dist.] 1974, no writ)) (emphasis added in Flores). As the district court below noted, the Texas courts have adopted the "transactional approach" to analyze claim preclusion. See Barr v. Resolution Trust Corp., 837 S.W.2d 627, 631 (Tex. 1992). Under the "transactional approach," "a final judgment on an action extinguishes the right to bring suit on the transaction, or series of transactions, out of which the

action arose." Id. The inquiry requires an evaluation "as to whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage." Id. (quoting Restatement (Second) of Judgments § 24(2) (1982)).

In this case, Paul's present claim is essentially based upon the same factual background as his state wrongful discharge action. Instead of arguing that he was discharged for unwillingly violating a state statute, Paul now argues that he was subjected to a retaliatory discharge under the FCA. 31 U.S.C. § 3730(h) (1994). The "operative facts" in the instant action are no different from his state action wherein Paul argued that he was fired for "refus[al] to commit an illegal act." Paul, 801 S.W.2d at 229. The central question in both cases is why was Paul discharged. Moreover, despite Paul's attempt to append his discharge claim to a new, additional theory of recovery -- the alleged filing of false or fraudulent claims -- the new theory arises from the same "transaction, or series of transactions" which led to Paul's firing, and Paul clearly could have included that theory in the earlier action. Langston, 827 F.2d at 1047 (noting res judicata "bar[s] all claims that were or could have been advanced in support of the cause of action"). Finally, even if the purported fraud occurred in locations in addition to Houston and through 1988, Paul still could have included these claims with his state-court action, which was tried after 1988. The lower courts, therefore, ruled properly that Paul's FCA action is barred because the claims could have been advanced in a prior action.

D. The Lower Courts Properly Found That The Present Parties Were Either Parties Or In Privity To Parties To The Prior State-Court Action

Paul challenges the rulings of the district court and the Fifth Circuit, arguing that because BMI, PBQD and the United States were not parties to the prior action, res judicata cannot be applied. Pet. 23. Paul, however, fails to address or even acknowledge the lower courts' analyses and conclusions that BMI and PBQD constitute "privies" of PB-KBB with respect to the state-court action. Further, Paul's argument -- raised for the first time on appeal and labelled "frivolous" by the Fifth Circuit -- that the United States was not a party to the state-court action ignores that he was a party to the prior action, he had his day in court, and he is the party that is barred by the doctrine of res judicata. The res judicata bar prohibits Paul from having a second -- or in this case fourth -- day in court.

1. BMI Is A Privy With PB-KBB With Regard To The Prior State-Court Action

While federal res judicata cases distinguish between concepts of "privity" and "mutuality," see generally 1B Moore's Federal Practice ¶ 412 (1995), Texas law -- which must be applied in this case -- uses the term "privity" to describe both concepts. "Privity connotes those who are in law so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right." United States Fire Ins. Co. v. Millard, 847 S.W.2d 668, 674 (Tex. App. -- Houston [1st Dist.] 1993, n.w.h.) (citation omitted). The Texas

courts also have found privity between parties where one party's liability is derivative of the other's. Lemon v. Spann, 633 S.W.2d 568, 570 (Tex. App. -- Texarkana 1982, writ ref'd n.r.e.) ("[W]here the rights or liabilities of a party are derivative, a judgment binding a party from whom the rights or liabilities are derived may be set up as a bar in a second suit.").

For example, in Soto v. Phillips, 836 S.W.2d 266 (Tex. App. -- San Antonio 1992, writ denied), an employee who lost a workers' compensation action brought a second claim against his employer, the workers' compensation carrier and two physicians who testified at the first state trial. Id. at 267-68. In the new case, the plaintiff alleged a conspiracy, arguing that the physicians were paid-off by the other defendants in exchange for favorable testimony. Id. at 267. The state trial court granted summary judgment for defendants, and the appeals court affirmed, concluding that the plaintiff essentially accused the physicians of "acting in concert with, or being agents of, the carrier and the employer," and, thus, the plaintiff was alleging "vicarious liability." Id. at 269. The court held that "[i]n situations of vicarious liability . . . a judgment for one of the persons in the vicarious relationship bars a later action against the other." Id. (citing Restatement (Second) of Judgments § 51(1)). Consequently, the court held that the action was barred on grounds of res judicata.

In the present case, the lower courts concluded that BMI was in privity with PB-KBB and, thus, was entitled to the preclusive effects of the prior state-court action. These conclusions -- finding privity in a case alleging derivative or vicarious liability -- is an appropriate application of Texas law to the facts. First, PB-KBB was one of the joint venturers to which

BMI subcontracted the design of the exploratory shaft facility. Second, the gravamen of Paul's complaint is that the joint venturers' work under the Subcontract was deficient. Third, Paul has specifically alleged in his complaint that BMI is "vicariously liable" for the actions of its subcontractor. Fourth, Paul contended that BMI and PB-KBB engaged in "collusive activities." Finally, Paul's allegations against BMI and PB-KBB are virtually identical. Accordingly, the lower courts' holdings, that BMI should be given the benefit of whatever res judicata consequences arise from state-court action, is correct.

2. The Preclusive Nature Of The Prior State-Court Action Binds Paul Because He Was A Party To That Action

Paul's assertion that there can be no res judicata because the United States was not a party to the prior state-court action is so patently meritless that the Fifth Circuit labelled it "frivolous." The United States declined to intervene in this action, and BMI has never contended that the res judicata bar that impacts Paul likewise prohibits the United States from pursuing any claims it may have against Respondents. Instead, the district court decision is a bar against Paul, who certainly was a party to the prior state-court action. Apparently, Paul would like to characterize his action as one brought by the United States, as if he had no interest in the litigation. Such an interpretation, however, is contrary to the law. See Public Interest Bounty Hunters v. Board of Governors of Fed. Reserve Sys., 548 F. Supp. 157, 161 (N.D. Ga. 1982) (rejecting qui tam plaintiff's argument that "the United States is the true plaintiff" and holding that "the cause of action

brought against defendants . . . 'belongs' not to the United States, but to the qui tam plaintiff').

Any other conclusion -- that is, accepting Paul's position that his qui tam action cannot be barred by the doctrine of res judicata -- would permit a plaintiff to overcome the bar to serial litigation and would be contrary to those cases that have barred FCA cases based upon the doctrine of res judicata. See, e.g., United States ex rel. Hindo v. University of Health Sciences/The Chicago Medical Sch., 1993 U.S. Dist. LEXIS 17306, at *6 (N.D. Ill. Dec. 7, 1993) (dismissing FCA claim on res judicata grounds based on prior state-court judgment); Robbins on behalf of United States v. Desnick, 1991 U.S. Dist. LEXIS 418, at *10-*11 (N.D. Ill. Jan. 10, 1991) (dismissing qui tam suit on res judicata grounds); see also Estate of Menna v. Saint Agnes Medical Ctr., 1994 U.S. Dist. LEXIS 13693, at *32 (E.D. Pa. Sept. 22, 1994) (staying federal FCA suit while state action pending and noting, upon resolution, state action could constitute res judicata). Accordingly, Paul's attempt to overcome the impact of res judicata by arguing that he has no personal stake in the litigation has no merit.

E. The Fifth Circuit Properly Declined To Address Paul's Attacks On The Validity Of The Prior State-Court Judgment And, In Any Event, Paul's Attacks Are Meritless

Because Paul did not argue in the district court that the judgment in the state court was not a final judgment on the merits, the Fifth Circuit properly declined to address Paul's assertions that the state court lacked jurisdiction over the action and that the state-court judgment was procured by fraud. Paul, No.

94-20640, slip op. at 3-4; see also In re Grand Jury Proceedings, 517 F.2d 666, 675 (5th Cir. 1975) (noting where "argument is raised for the first time on appeal," "the point [is considered] waived" and should not be considered). Where a court of appeals, in its discretion, declines to consider a matter not raised before the district court, the Supreme Court should, absent "exceptional circumstances," not consider the matter. See Jones v. United States, 362 U.S. 257, 272 (1960); Lawn v. United States, 355 U.S. 339, 362-63 n.16 (1958). As shown below, Paul's challenges are patently without merit and, thus, raise no exceptional matters warranting this Court's discretionary consideration of an initial matter on review. See, e.g., Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631, 2639 (1991) (exercising discretion to hear matter where "faced with a constitutional challenge that is neither frivolous nor disingenuous").

1. Jurisdiction For Paul's State-Court Action Was Properly Vested In The Texas State Court

The prior state-court action was brought by Paul in a court of general jurisdiction in Harris County, Texas. See Tex. Gov't Code Ann. § 24.007 ("Jurisdiction") (Vernon 1988). That action concerned whether, under Texas state law, Paul had been wrongfully terminated from his employment in PB-KBB's Houston, Texas office. Paul, 801 S.W.2d at 229. Paul, as the plaintiff in that case, chose the forum and elected to bring the action in Texas state court. There is no basis upon which Paul can now challenge the state court's subject matter jurisdiction over his state law claim. See generally Restatement (Second) of Judgments § 12 (1982) (noting that parties are precluded from litigating a "court's subject matter

jurisdiction in subsequent litigation [unless] [t]he subject matter jurisdiction of the action is so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority"). Consequently, Paul's subject matter jurisdiction attack is without merit.

Paul still argues that somehow the Texas state court lacked in personam jurisdiction over certain "indispensable parties," -- specifically, two "Canadian domiciled employees" who were "assigned [] Paul's work" after Paul's employment was terminated. Pet. 3, 17-19 & 21-22. Although the true nature of Paul's contention is difficult to ascertain, apparently Paul believes that after his employment was terminated by PB-KBB, he was replaced by two Canadians, and the state court did not have in personam jurisdiction over the two Canadians. Despite Paul's assertion that these two individuals are "indispensable parties," Paul never named them as defendants in the state-court action, and Paul participated fully in that action, without raising the issue of joinder of additional parties. Paul cannot now raise this issue. Pirtle v. Gregory, 629 S.W.2d 919, 920 (Tex. 1982) (noting "parties who participate in the trial without complaint will not be heard to complain at the appellate stage" that additional parties should have been joined).

Moreover, even accepting Paul's groundless claim that he was replaced by two Canadians, Paul puts forth no facts to suggest that indispensable parties were lacking in the prior Texas state-court action. Rule 39 of the Texas Rules of Civil Procedure, which parallels Rule 19 of the Federal Rules of Civil Procedure, addresses the joinder of indispensable parties. Tex. R. Civ. P. r. 39 (West 1995); see also Fed. R. Civ. P. 19. Essentially, the purpose of the federal

and state joinder rules is to ensure that the interests of all parties to litigation are protected. See generally Schutten v. Shell Oil Co., 421 F.2d 869, 873 (5th Cir. 1970); Vondy v. Commissioners Court of Uvalde County, 620 S.W.2d 104, 106-07 (Tex. 1981). For example, the right of a defendant not to be subjected to multiple litigation and potential inconsistent obligations are central concerns under these rules. Id.; Schutten, 421 F.2d at 873. Paul has presented no argument that "the Canadians" had any interest in the state-court action such that they should have been joined as parties, and he has not explained how "the Canadians" could have been liable to Paul under the applicable state law in that case. Moreover, Paul presents no evidence that there was any possibility of inconsistent judgments or that Paul's rights could not be fully litigated in the state-court action. Consequently, Paul's argument is devoid of merit.

2. The State-Court Judgment Cannot Be Collaterally Attacked On The Basis Of Alleged Fraud

Generally, even if a judgment was obtained by fraud, that judgment is still res judicata in a subsequent action, provided the prior court had jurisdiction to render the judgment. See Vandervoort, Sams, Anderson, Alper & Post, P.A. v. Vandervoort, 529 F.2d 424, 426 (5th Cir. 1976) (noting that a "collateral attack on a judgment" based upon fraud is "irrelevant" once "it [has been] determined that the court had jurisdiction"); see generally 21 Federal Procedure, L. Ed. § 51:188 (1984) ("As a general rule, even a judgment that was obtained by fraud is res judicata so long as the court rendering it had jurisdiction to do so."). As discussed above, jurisdiction

in the prior state-court action was properly vested in the Texas state court.

There is, however, a narrow exception, permitting collateral attack on a prior judgment if the attack is based upon "extrinsic," rather than "intrinsic," fraud. Fidelity Standard Life Ins. Co. v. First Nat'l Bank & Trust Co., 382 F. Supp. 956, 963 (S.D. Ga. 1974), aff'd, 510 F.2d 272 (5th Cir.), cert. denied, 423 U.S. 864 (1975); Raney v. Mack, 504 S.W.2d 527, 533 (Tex. Civ. App. -- Texarkana 1973, no writ). "'[I]ntrinsic fraud' [includes] false testimony, fraudulent instruments, and any fraudulent matter that was presented and considered in rendering a judgment." Raney, 504 S.W.2d at 533. By comparison, "fraud that is extrinsic in its nature, [prevents] one from having a real contest of the suit based on conduct or activities outside of the court proceedings themselves." Fidelity Standard Life Ins. Co., 382 F. Supp. at 963. Such "extrinsic" fraud "must be collateral to the matter tried, and not something which was actually or potentially in issue in the trial." Raney, 504 S.W.2d at 533.

In the instant case, the fraud that Paul claims occurred in the state-court action consists solely of allegations of "intrinsic" fraud. Paul contends that in the state-court proceeding, PB-KBB put forth a "fraudulent" excuse as to why Paul's employment had been terminated. Pet. at 21. Yet, the reason for Paul's termination was the exact issue that was before the court. Paul, 801 S.W.2d at 229. Where the purported fraud "relates to the material issues in the [] case," then the attack on the prior judgment solely involves "intrinsic" fraud and cannot be the basis for a collateral attack. Gilbert v. Franklin County Water Dist., 520 S.W.2d 503, 505-06 (Tex. Civ. App. -- Texarkana 1975,

no writ). Because the alleged fraud relates solely to the issue pending before the court, Paul's attack on the prior state-court judgment is devoid of merit.

II. Paul's Attacks On The Magistrate Judge's Ruling Raise No Matters Warranting The Grant Of Certiorari

Paul's final arguments, that the United States Magistrate Judge's involvement was improper, fails to raise an issue warranting the grant of certiorari. United States Magistrate Judges are granted authority to rule on specific civil and criminal motions. See 28 U.S.C. § 636 (1988). For example, under § 636(b)(1)(A), a magistrate judge may rule on "[a] non-dispositive pretrial motion such as a discovery motion." Brown v. Wesley's Quaker Maid, Inc., 771 F.2d 952, 954 (6th Cir. 1985) (emphasis in original), cert. denied, 479 U.S. 830 (1986). Under this provision, a district court need not seek the consent of any party to refer the non-dispositive pretrial motion to the magistrate judge. See 28 U.S.C. § 636(b)(1)(B).

Paul contends that it was error for the magistrate judge to deny his motion to compel production of documents because he never consented to her involvement under § 636(c). Pet. 24. The order that Paul challenges, however, was a non-dispositive discovery order for which consent of the parties was not necessary. See 28 U.S.C. § 636(b)(1)(B). The magistrate judge did not try the case and, thus, Paul's reliance upon § 636(c) (which requires the consent of parties) is misplaced.

Nevertheless, Paul also claims that the magistrate judge's denial of his motion to compel was arbitrary and did not comply with requirements of

Federal Rules of Civil Procedure 12(b)(6) and 56. Pet. 24. If Paul is attempting to challenge the appropriateness of the magistrate judge's ruling, he should have done so before the district court. Ayala v. United States, 980 F.2d 1342, 1352 (10th Cir. 1992) (failure to appeal magistrate judge's ruling to district court constitutes a waiver of right to appeal); see also Good v. Allain, 823 F.2d 64, 66 (5th Cir. 1987). As with so many other issues, Paul did not raise this matter before the district court but raised it for the first time on appeal and, thus, cannot raise it now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court Of The United States
October Term, 1995

UNITED STATES OF AMERICA
EX. REL. DILIP K. PAUL,
Petitioner

v.

U. S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION and PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC., PB-KBB, INC. and BATTELLE MEMORIAL INSTITUTE,
Respondents

Petition For A Writ Of Certiorari
The United States Court Of Appeals
For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Petitioner would like to point out the following willful misrepresentations were made by respondent Battelle Memorial Institute (BMI) in its brief:

Response to statements under JURISDICTION:

BMI's statements that petitioner Dilip Paul is not the original source of information, and the suit is brought with publicly disclosed information, are fraudulent, false and submitted under bad faith, in order to mislead the Supreme Court.

Petitioner has submitted a written evidence, his exhibit no. 12, which he submitted to respondant P.B.-K.B.B. on July 28, 1982. This is a 44-page document which provides PRIMA FACIE evidence that petitioner Paul is the ORIGINAL AND SOLE source of information upon which the suit is filed.

The suit is based on respondant Parsons, Brinkerhoff, Quade & Douglas (PBQ&D)/P.B.-K.B.B's fraudulent submission of a bid in order to receive U.S. contracts and their fraudulent submission of performance to the United States. The Suit is for collecting the entire amount of direct and consequential damages suffered by the United States, and by the petitioner as a result of responants' willful violation of the requirements of the False Claims Act, 31 U.S.C. § 3729 et seq.

There is absolutely no public information on any of those, and BMI will not be able to show any evidence to this court on these, and BMI knows it.

The courts below looked at BMI's

fraudulent contention, and rejected it, and BMI knows it too.

The court may note that BMI's this contention contradicted its other contentions made in its brief in Opposition, which have totally destroyed the credibility of its reply brief. For instance, it stated under its PROCEDURAL HISTORY and under LITIGATION HISTORY that there were prior litigations in which the petitioner was the plaintiff. Also on p-16, under "C" it stated "The Lower Courts Properly Found That Paul's Instant False Claims Act Suit Constitutes the Same Cause of Action As His Prior State-Court Claim"

Paul could not have litigated the case all along, if he is not the ORIGINAL SOURCE of information.

These are the kinds of misrepresentations BMI has put forward in every sentence of its opposition to the petition for certiorari, and this court should disregard BMI's oppositions. BMI is not an honest organization and its brief totally unmasked its phoney nature and exposed its true character.

BACKGROUND OF ORIGINAL CASE: PB-KBB obtained an original judgement for wrongful termination of petitioner in the Harris County court by fraud, perjury, evasion, changing its prior testimonies to the Mine Safety Review Commission, and by willfully disregarding the requirements of Fed. Rules of Civ. Procedure (FRCP) No. 33 and 37. The newly discovered evidence also show that Harris County judgement was void, as an indispensable party, as required under FRCP 19 for just adjudication, could not be brought on the

trial due to PB-KBB's cover-ups, evasive responses submitted during discoveries, and due to its other misconducts. Further, that indispensable party is of Canadian domicile and Harris County court lacked in personam jurisdiction over it. [28 U.S.C § 1332 (a)(2)].

Response to SUMMARY OF ARGUMENTS:

The courts below erred in ruling in the instant case, as the judgment of the original case, as well as the instant case, which relied on the original one, are void, because of lack of subject matter jurisdiction, in personam jurisdiction, and due to lack of due process in both cases. As such, the original judgment is subject to collateral attack, and the instant judgment is subject to direct attack.

Further, in the original case in Harris County court, only plaintiff's exhibit 5A, dealing with defendant's preliminary design in the Deaf Smith County, Texas, was on trial. P.B.-K.B.B's firing of petitioner for not participating in that design was the sole cause of action in the original case.

In the instant case, plaintiff's exhibit 5A, as well as exhibits 5C, 5D and [+ designs in four additional sites], dealing with defendants' designs in Utah, Texas Mississippi, and in Louisiana, are on trial. So, both cases did not originate from same set of facts. The exhibit A is NOT EQUAL TO [exhibit A + exhibit C + exhibit D + four other sites in four states].

Each of the states is independent and sovereign to the other, and one state cannot usurpate on another state's

jurisdiction. As such, a Texas state court cannot adjudicate a case arose in Utah, in Mississippi or in Louisiana. It does not have the authority to do so. So, the original case and the instant case did not arise out of same sets of operative facts. So, res judicata and collateral estoppel are also inapplicable in the instant case. Hence the instant judgment is also void for lack of due process as as well.

Further, Texas laws will not be applicable in the instant case, because statutory directions of the False Claims Act (FCA) will control. In addition, application of State laws will destroy the consistency of FCA adjudication throughout the country, and, in the process, will ruin the FCA's effectiveness as a tool to protect the U.S. from the cheaters.

Response to BMI's Issue No. I.

As per the Harris County District Court's jurisdiction over the False Claims Act, appellant believes that the following Supreme Court holdings in Claflin v. Houseman, 3 Otto 130-143, 1876, is relevant. It stated:

> "Congress has not the power, if it had the will, to confer Jurisdiction on any State Court." [Citations].
>
> "Where Congress has an exclusive right to legislate, the National Courts have an exclusive power to adjudicate". [Citations]
>
> "Or, as expressed in U.S. v. Cornell, 2 Mason, 91: 'The right to exclusive legislation carries with it the right of exclusive jurisdiction.'"
>
> ---
>
> "Where the State cannot legislate,

its courts cannot adjudicate. To hold otherwise, would make the creature greater than the creator." [Citations]

"States, in providing their own judicial tribunal, have a right to limit, control and restrict their judicial functions and jurisdiction, according to their own pleasure". [Citation]

"No court can exercise a jurisdiction which its sovereign cannot confer. [Citations]

"On the other hand, jurisdiction of a cause of action cannot belong to a court which cannot be controlled by the authority creating such cause of action."

"This cause of action was created by Congress. Congress cannot control the State Courts; therefore the State Courts have no jurisdiction."

Response to BMI's Issue No. II

On the applicability of Texas State laws on the adjudication of the False Claims Act, the statements of the Supreme Court, in Claflin, supra, is relevant

"Where a new right is given, which the party would not be entitled to but for the statute, the remedy afforded by the statute is exclusive." [Citations]

For the reason stated, the instant judgment entered by the court below, is VOID, as it was entered without due process.

Further, the Texas state law has no application in cases within the jurisdiction of Utah, Louisiana and of Mississippi. Hence, the instant judgment is VOID, as it was entered without due process, for this reason as well.

RESPONSE TO BATTELLE'S ARGUMENTS

Response to ARGUMENT I A.

As stated in Calflin, supra, Battelle's contentions are absurd and do not comply with the U.S. Constitutional provisions and with the long-standing holdings of the cited case laws of this court on this issue.

BMI stated that Paul did not cite any authority where a state agency became defendant under FCA. There are numerous such authorities, and only handful of them are cited here: United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center (1992 CA4 Md) 961 F2d 46; United States v. Board of Education (1988, DC NJ) 697 F Supp 167; United States ex rel. Hagwood v. Sonoma County water Agency (1991 CA 9 Cal) 929 F2d 1416; U.S. ex rel. Fine v. University of California, N.D.Cal.1993, 821 F. Supp. 1356. BMI's contentions and citations under this issue are misleading and inappropriate.

Response to ARGUMENT I B.

As stated in response to Battelle's Issue No. 2, Summary of Arguments, Battelle's contentions are contrary to this court's holdings and do not comply with the U.S. Constitutional requirements.

Response to ARGUMENT I C.

As stated on the summary portion of the argument, the original case and the instant case did not arise out of the same set of facts. The instant case arose out of defendants' activities in four states [Utah, Texas, Louisiana & Mississippi], whereas the original case arose out of

PB-KBB's activities in Texas only.

Response to ARGUMENT I D.

In the original case, Dilip Paul and PB-KBB, were the parties. However, due to PB-KBB's misconducts, cover-ups, perjury and disregard to the FRCP 33 and 37, (28 U.S.C.A), an indispensable party, Thyssen (CANADA)'s employees of Canadian domicile, could not be brought in the original suit.

In the instant case, the United States of America and Dilip Paul are the plaintiffs.

Parsons, Brinkerhoff, Quade & Douglas Inc, P.B.-K. B.B., and Battelle Memorial Institute, are the defendants. However, newly acquired information from Harry Gleser, an ex-employee of PB-KBB, Thyssen (Canada)'s Canadian domiciled employees need to be included as co-defendant. Thyssen (Canada) did the fraudulent designs in Utah, in Texas and in Mississippi, which are the subject matter of the instant suit.

The court may note that Texas state court does not have jurisdiction over the Canadian domiciles. Hence the original judgment is void and the instant judgment, declaring res judicata and collateral estoppel, is also void, for the same reasons.

A void judgment is something very different than a valid judgment. The void judgement creates no binding obligation upon the parties or to their privies; it is legally ineffective. [Kelb v. Feuerstein (1940) 308 US 433, 60 S.Ct 343, 84 L ed 370; Williams v. North Carolina (1945) 325 US 226, 65 S. Ct 1092, 89 L ed 1577]

Response to ARGUMENT I D. 1.

BMI is privy to THYSSEN (CANADA) too. Battelle submitted the fraudulent designs performed by the Canadians and collected money from the U.S. As such, due to their conspiratorial relationships, neither Battelle, nor the Candians could be brought to the Texas State court, because of lack of in personam jurisdiction.

Response to ARGUMENT I D. 2.

Paul is not bound by a state court judgment which is void.

Response to ARGUMENT I E.

Paul argued quite extensively in the District court that the state court judgment is not on the merits. [see the cited portions of Paul's pleadings on the record]. So this court should review what is on the record.

Response to ARGUMENT I E. 1.

BMI states that because of United States decline to prosecute the Qui Tam action, the subject matter jurisdiction of the instant action is changed. This is a gross misrepresentation of the qui tam provision of the False Claims Act, [31 U.S.C. § 3729 et seq.] The court may note that all of the BMI cited case laws here are from the U.S. District Courts. The cited case laws provide PRIMA FACIE evidence that in qui tam actions, the subject matter jurisdiction of the False Claims Act is not transferred to the state courts, as Battelle try to misrepresent here.

BMI also failed to show how the U.S. became a non-party here when all of its interests are protected by the qui tam

plaintiff, and two of its attorneys are monitoring the instant case.

Response to ARGUMENT I E. 2.

A void judgment may be collaterally attacked at any time in any proceeding, state or federal, in which the effect of the judgment comes in issue, which means that if the judgment is void it should be treated as legally ineffective in the subsequent proceeding. [Comprehensive Merchandising Catalogs, Inc. v. Madison Sales Corp. (CA7th, 1975 521 F2d 1210; Little v. Celebrezze, D.C. Tex 1966, 259 F. Supp. 9; Hickling v. Edwards, C.A8th, 1955, 226 F.2d 410].

Response to BMI Issue II

The instant judgment is void due to the lack of due process of law.

CONCLUSIONS

At issue here is the fate of the 133 years old False Claims Act, and that of the U.S. Nuclear Waste Isolation project(s). The decision of this court will definitely set the courses for these two vital national issues.

For 133 years False Claims Act related cases have been exclusively adjudicated in the U.S. courts. The Constitutional directives, statutory languages and this courts holdings on similar cases, state that the State courts do not have concurrent jurisdiction to try the instant case. There is absolutely no reason for changing the long-standing holdings of this court.

Besides the Subject matter jurisdiction, territorial and in personam jurisdictions, as well as due process of

law, is at issue here. All of these issues are Constitutionally significant.

PB-KBB and its attorneys obtained the Texas judgment for wrongful termination by frauds, perjuries, cover-ups, evasions, misrepresentations, changing testimonies given to earlier tribunals, misconducts and by disregarding the requirements of FRCP no. 33 and no 37, 28 U. S.C.A. Under such circumstances they are subject to sanctions under FRCP 37 (b). The United States' claims against the unscrupulous defendants cannot be collaterally precluded on the basis of such illgotten judgment in a County court.

The Congress, while enacting and amending the False Claims Act, intended to deal with such unscrupulous and cheating federal contractors. By perpetrating frauds on the court, defendants have demonstrated their criminal propensities, and the court records will show those.

BMI's reply brief is loaded with misstatements of facts and misleading interpretation of their version of the laws. Defendants have defrauded the U.S. for more than 6/7 years. They brought doom to every project they got involved in.

WHEREFORE, based on the foregoing, petitioner prays that writ of certiorari be granted.

Respectfully submitted

Dated January-16-'96

Dilip K. Paul

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